No. 90-1787

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In the Matter of the Application of The LUDLOW PARK HOMEOWNERS ASSOCIATION, INC., HENRY SPALLONE as Mayor of the City of Yonkers, and G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners,

- against -

THE COUNTY OF WESTCHESTER and the WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents,

UNITED STATES OF AMERICA and STATE OF NEW YORK,

Intervening-Respondents,

for an order pursuant to CPLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Admitted to the Bar of the Supreme Court of the United States on May 13, 1991

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Of Counsel

Petitioner respectfully petitions for a Writ of certiorari to review the final judgment in the proceeding which was affirmed by the United States Court of Appeals for the Second Circuit on February 19, 1991. The order of the Court of Appeals is attached hereto as Appendix A. The District Court's order and judgment are attached as Appendix B.

QUESTIONS PRESENTED:

1. Does the All Writs Act [28 U.S.C. §1651(a)][1] confer subject matter jurisdiction upon the United States District Court over a proceeding commenced in New York State court to review the administrative determination of a local agency under the New York State Environmental Conservation Law where, as a matter of law, no Federal concern could be, or was, considered in determining the merits of the proceeding?

2. Did the application of the All Writs Act as the basis for subject matter jurisdiction in this proceeding violate the United States Constitution [Section 2, Article III]?[2]

[1] 28 U.S.C. §1651(a) provides as follows:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[2] Section 2, Article III of the Constitution provides as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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BASIS FOR JURISDICTION

Petitioners-appellants urge that the Court has jurisdiction to entertain this petition pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 2, Article III, of the Constitution defines the judicial power of the United States.

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

The Yonkers Joint Sewage Treatment Plant ("YJSTP") is a large secondary sewage treatment plant on the Hudson River in Southwest Yonkers. Storm, residential and industrial sewage generated by 65% of Westchester County are treated by the plant, which lies immediately adjacent (except for the width of four railroad tracks) to residential neighborhoods.

Under compulsion embodied in a Federal Consent Decree between Westchester County, New York State and the Federal government for cessation of ocean dumping of sludge produced by the YJSTP, Westchester County proposed the construction of a $20 million sludge dewatering plant within the YJSTP. Westchester County's Department of Environmental Facilities applied to the Westchester County Board of Legislators, acting as an administrative agency, for a determination that the proposed sludge dewatering plant would have no significant environmental impact, in order to avoid the requirement of preparing an environmental impact statement under New York law.

The Westchester County Board of Legislators, acting administratively under the New York Environmental Conservation Law, determined that the proposed construction of a dewatering facility within the YJSTP would not have any significant environmental impacts. Petitioners-appellants, an incorporated home-owner's association and public officials representing the proceeding" under the New York Civil Practice Law and Rules to review and annul the administrative decision.

The proceeding was instituted in the New York State Supreme Court and removed by Westchester County to the

District Court for the Southern District of New York under 28 U.S.C. §1441. At the initial conference before United States District Judge Whitman Knapp, appellants advised the court of their intention to move to remand and the intervening respondents advised of their intention to move to retain the proceeding in the District Court under the "All Writs Act". Thereafter, a motion was made by the intervening respondents to retain jurisdiction under the "All Writs Act" and appellants cross-moved to remand. Judge Knapp granted the motion to retain jurisdiction under the "All Writs Act" and denied the remand motion as moot. After Judge Knapp determined that the District Court would retain jurisdiction, he upheld the determination of the Board of Legislators on the merits, and petitioners-appellants appealed to the Court of Appeals for the Second Circuit. The Court of Appeals for the Second Circuit affirmed, in its order dated February 19, 1991.

REASONS FOR GRANTING THE WRIT

Petitioners-appellants submit that the courts below misapplied the "All Writs Act" and transgressed the Constitutional limits of Federal jurisdiction.[3]

I. THE ALL WRITS ACT DOES NOT CONFER SUBJECT MATTER JURISDICTION OVER THE PROCEEDING

The authority of a United States District Court under the "All Writs Act" is reserved for extraordinary instances in which a party is engaged in conduct which threatens to

"... frustrate the implementation of a court order..."

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[3] While petitioners-appellants do not propose for review the lower courts' determination on the merits [i.e. that the Board of Legislators' administrative determination that an environmental impact statement was unnecessary], the determination was, it is submitted, certainly incorrect. Among other reasons, the sludge dewatering plant is a "Type I" project (under definitions in the New York Environmental Conservation Law, and rules) within a legislatively-declared environmentally sensitive area, and New York law nearly commands that an environmental impact statement be prepared in such an instance. See: Tehan v. Scrivani, 97 A.D.2d 769, 468 N.Y.S.2d 402 (2d Dept. 1983); Inland Vale Farm Co. v. Stergianopolis, 65 N.Y.2d 718, 492 N.Y.S.2d 7, 481 N.E. 2d 547 (1985).

United States v. New York Telephone Co., 434 U.S. 159, 174 (1977). Federal courts have invoked the "All Writs Act" to assume jurisdiction over State litigation, or to enjoin State litigation, when the possible outcome was seen as directly, and necessarily, impairing the terms of a standing Federal order. Thus, in Yonkers Racing Corp. v. City of Yonkers, 858 F. 2d 855 (2d Cir. 1988), cert. denied 109 S.Ct. 1527 (1989), the relief sought in the State litigation—an injunction preventing municipal condemnation of properties for construction of low-income housing—directly contravened a District Court order commanding the municipality specifically to condemn the very properties whose owners were seeking to prevent condemnation by a countervailing State court injunction. Finding that the circumstances presented were "exceptional" (858 F.2d, at 864) and that the State litigation went "to the very essence" of a District Court order, the Court of Appeals affirmed an injunction under the All Writs Act. See also: In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985); United States v. International Brotherhood of Teamsters, 728 F.Supp. 1032 (S.D.N.Y. 1990) Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974); Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986).

Here, the "All Writs Act" was misapplied because the outcome of this proceeding posed no threat to the implementation of the Consent Decree and because no Federal concern could be considered in determining the merits. The Federal Consent Decree involved in this case provides that

> "This Decree and Agreement in no way affects or relieves the defendant of responsibility to comply with any ... State or local law or regulation." (Emphasis supplied.).

Even taken alone, this provision of the Consent Decree negates any assertion that litigation designed to enforce compliance with the New York State Environmental Conservation Law could "frustrate" the Consent Decree. Very much to the contrary, in view of the Consent Decree's express affirmation of Westchester County's need to comply with State law, the Article 78 proceeding must be seen as being in harmony with the Consent Decree, not as in frustration of it.

The lower courts' rulings that this proceeding threatened to "frustrate" the Consent Decree appears all the more incorrect in light of the Decree's force majeure clause, which relieves the County of default in the event of

> "... an event ... including but not limited to a judicial injunction issued by a court of competent jurisdiction ... beyond the control of the defendant..."

The combined effect of the provision affirming the County's need to comply with State law and the force majeure clause is to make clear that the Article 78 proceeding does not "frustrate" the terms of the Consent Decree but, rather, is an eventuality fully contemplated, and accounted for, in the Consent Decree. And even further, the Consent Decree authorizes a special master to entertain requests for modification of time deadlines, incorporating the provisions of Rule 60(b) Fed. R. Civ. P. which affords the Court broad discretion to modify the Consent Decree. Thus, even if it were not clear that the very terms of the Consent Decree expressly accommodate the prosecution of the Article 78 proceeding, the provisions for modification serve greatly to soften the impact of the Article 78 proceeding on the Consent Decree, certainly to the point that it becomes difficult to characterize the impact of the Article 78 proceeding as "frustrating" the terms of the Consent Decree.

Submittedly, the prerequisite for "All Writs Act" jurisdiction is a supportable finding that the outcome of the proceeding should be, and in the District Court would be, affected by Federal considerations inherent in the Consent Decree. But New York law does not permit such considerations to intrude in the determination to be made in this proceeding as to whether the proposed facility will have significant environmental impact. The District Court, in deciding the merits of the proceeding, affirmed that it could not and did not apply considerations which differed from those the State court would have been bound to apply. Neither the appellees, intervenors, nor the District Court suggested any Federal concern which should affect the outcome of this proceeding and which would have justified the District Court's preemption of the State

court's jurisdiction. Indeed, it was conceded below by the parties that the assumption of jurisdiction under the All Writs Act could not affect the determination on the merits and that the District Court was bound to apply the same considerations on the merits as the State court would have applied.

Accordingly, the assumption of jurisdiction was not authorized by the All Writs Act because neither the maintenance nor the outcome of the proceeding "threatened the implementation" [U.S. v. N.Y. Telephone Co.., supra] of the Consent Decree.

II. THE EXERCISE OF SUBJECT MATTER JURISDICTION IN THIS CASE WAS UNCONSTITUTIONAL

The Constitutionality of the "All Writs Act" on its face as an aid to Federal jurisdiction is not questioned. However, because of the important principles of Federalism embodied in Section 2, Article III of the Constitution, the Constitutional application of the All Writs Act must be reserved for instances in which a State court proceeding threatens substantially to impair some Federal action and, therefore, where some Federal interest may properly be weighed in determining the merits. Without a Federal concern which can be considered in determining the merits of this proceeding, there was no justification for usurping the State court's jurisdiction.[4] To invoke the "All Writs Act" to assume jurisdiction over a State court proceeding in which no Federal concern can affect the merits is, definitionally, in violation of the Constitutional limits of Federal jurisdiction.

Petitioners-appellants submit that this case presents an opportunity for this Court to pronounce the appropriate limits of Federal Court jurisdiction under the "All Writs Act".

CONCLUSION

The petition should be granted.

May 13, 1991

Edward P. Borrelli

EDWARD P. BORRELLI

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[4] It would well be argued that there must be an "outcome-determinative" Federal concern to support jurisdiction under the All Writs Act.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of , one thousand nine hundred and ninety one.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. ROGER J. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges.

In the matter of the application of the LUDLOW PARK HOMEOWNERS ASSOCIATION, INC.; HENRY SPALLONE, as Mayor of the City of Yonkers; G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners-Appellants,

v.

ORDER
90-6247

THE COUNTY OF WESTCHESTER and WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents-Appellees,

UNITED STATES OF AMERICA
and STATE OF NEW YORK,

Intervening-Respondents,

for an order pursuant to PLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

UPON CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Southern District of New York (Knapp, J.), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is affirmed.

Petitioners-appellants Ludlow Park Homeowners Association, Inc., Henry Spallone, and G. Oliver Koppell appeal from a judgment entered in the district court dismissing their petition brought under Article 78 of the New York Civil Practice Law and Rules ("CPLR") for review of an environmental decision. Appellants also appeal from Judge Knapp's judgment in a related case, United States and State of New York v. County of Westchester, et al., 89 Civ. 5274 (S.D.N.Y. May 24, 1990), granting the motion of the United States brought under the All Writs Act, 28 U.S.C. s1651(a), for the district court to retain jurisdiction over the petition.

Appellants are a homeowners' association, composed of residents of the area adjacent to the Yonkers Joint Wastewater Treatment Plant ("YJWTP"), and two public officials. On March 22, 1990, appellants commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, to annul an administrative decision made by the Board of Legislators of the County of Westchester (the "County") under the New York State Environmental Quality Review Act ("SEQRA"). The County decided that a full Environmental Impact Statement ("EIS") was not required before the start of construction of a sludge dewatering facility to be built inside the existing Chlorine and Maintenance Building at the YJWTP. Accordingly, the County issued a "negative declaration" determining that the proposed action would not have any significant impact on the environment.

The proceeding was removed by appellees to the district court pursuant to 28 U.S.C. s1441. The appellants advised the court that they intended to move for a remand. The United States intervened for the purpose of retaining the case in federal court. It sought the issuance of an order under the All Writs Act ("All Writs Order") preventing state court litigation from interfering with the implementation of a federal consent decree that had been entered into in August, 1989 by the County and the

United States. Under the consent decree, the County was required to phase out by December 31, 1991 the dumping of its sewage sludge into the ocean and to implement both interim and long-term plans for land-based disposal of the sludge. The United States contended that the relief sought by apellants would prevent the County from meeting its obligations under the consent decree. On May 24, 1990, the district court issued the All Writs Order and dismissed appellants' petition.

Under the All Writs Act, a federal court may issue an order "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). We may only reverse a decision to issue an order under that Act if we find that the district court abused its discretion in reaching that decision. Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942). Here, we believe that the district court did not abuse its discretion in issuing the All Writs Order to prevent interference with the 1989 consent decree. The record indicates that the lengthy process involved in producing an EIS would result in substantial delay, preventing the County from complying with the series of interrelated milestone events established by the consent decree to complete the phase-out of ocean dumping.

Appellants contend that the consent decree does not relieve the County of responsibility to comply with local law, and therefore the Article 78 proceeding in state court would not frustrate the purposes of the consent decree. However, if the state court were to find that the County's negative declaration was invalid, construction of the dewatering facility would be delayed, making it likely that the County would not meet the deadline provided in the consent decree. A remand to state court would threaten the "very essence" of the consent decree—the cessation of ocean dumping of sewage from the Westchester treatment plant by December, 1991. See Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855, 865 (2d Cir. 1988), cert. denied 109 S. CT. 1527 (1989).

Appellants argue that the negative declaration is deficient because it is not based on an adequate evaluation of environmental considerations and that the County failed to take a

"hard look" at the findings submitted by its consultants. In reviewing the SEQRA determinations that resulted in a negative declaration, a court may only consider "whether [the] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." Chinese Staff & Workers Ass'n. v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176, 178, 509 N.Y.S.2d 499, 501 (1986) (citation omitted). The County may rely upon advice received from consultants if reliance is reasonable and there is no reason to doubt the reliability of the consultants. Stewart Park & Reserve Coalition vs. New York State Dept. of Trans., 157 A.D.2d 1, 7, 555 N.Y.S.2d 481, 484 (3d Dept. 1990). Appellants have provided no evidence that the consultant firm's work for the County was unreliable or that reliance by the County was unreasonable, and thus we reject this contention. Similarly, although the dewatering facility project is of the type that typically requires an EIS, see 6 N.Y.C.R.R. s617.12, none is required here because the County's conclusion that the project would have no significant impact on the environment is rational and supported by the record. See United Petroleum Assn., Inc. v. Williams, 65 N.Y.2d 708, 481 N.E.2d 567, 492 N.Y.S.2d 27 (1985), aff'g on opn. below, 102 A.D.2d 491, 478 N.Y.S.2d 125 (3d Dept. 1984).

We have examined appellants' remaining contentions and find them to be without merit.

ELLSWORTH A. VAN GRAAFEILAND,

ROGER J. MINER,

J. DANIEL MAHONEY,

Circuit Judges.

N.B. This summary order will not be published in the federal reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the matter of the application of the LUDLOW PARK HOMEOWNERS ASSOCIATION, HENRY SPALLONE as Mayor of the City of Yonkers, and G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners,

-against-

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents,

for an order pursuant to PLR Article 78 reversing and annulling the determination of the respondents to the effect than an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

MEMORANDUM & ORDER
90 Civ. 2543 (WK)

WHITMAN KNAPP, U.S.D.J.

Petitioners the Ludlow Park Homeowners Association, Henry Spallone and G. Oliver Koppell seek a judgment pursuant to C.P.L.R. Article 78 and the State Environmental Quality Review Act ("SEGRA") reversing a determination by respondents the County of Westchester and the Westchester County Board of Legislators. For reasons which follow, we deny the petition.

BACKGROUND

The Ocean Dumping Ban Act of 1988 forbids ocean dumping of sewage sludge after December 31, 1991. In 1989, the United States and the State of New York brought suit against the County of Westchester and the Westchester County Department of Environmental Facilities, seeking to ensure that the County would comply with that statute. The action was resolved by a consent decree[5] establishing a timetable for the

[5] United States v. County of Westchester, No. 89 Civ. 5274 (WK), September 6, 1989

County's development of alternative means for disposing of its waste in accordance with the law.

The Yonkers Joint Wastewater Treatment Plant, which the County has operated since 1955, each day produces approximately 1,350 tons of liquid sewage sludge, which is dumped into the ocean. Such dumping will, under the terms of the statute, become unlawful unless discontinued on or before December 31, 1991. Under this consent decree, the County must, by that date, construct a "dewatering" facility[6] capable of transforming the liquid sewage sludge into "sludge cake," which can be disposed of on land.

In June 1989, the County hired Blasland & Bouck Engineers, P.C., an engineering consulting firm, to evaluate various methods for transporting the liquid sewage sludge from the YJWTP to such a dewatering facility and to identify possible sites for that facility. After assessing the relative environmental risks, cost-effectiveness and feasibility of several means of transporting liquid sewage sludge, the engineers concluded that the sludge might be transported by pipeline or by barge, but that the farther the liquid sewage sludge was transported the greater the risk of an accidental spill. With this in mind, the engineers identified twenty possible sites and rated them according to the following criteria: (1) distance the liquid sewage sludge would have to be transported, (2) distance to the nearest park, recreational area, cultural or archaeological resource, (3) distance to the nearest incompatible land use (i.e., school, hospital, day-care facility), (4) impact on local traffic, (5) distance to the nearest residential area, (6) impact on ambient area quality, (7) impact on ambient air quality, (8) visual impact, (9) method by which the liquid sewage sludge would have to be transported, (10) site preparation required, (11) site topography and (12) whether the site was publicly or privately owned. Based on those criteria, they narrowed their investigation to what they determined were the eleven best sites.

Then, the engineers conducted a detailed comparative analysis of how the facility would be constructed and operated

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[6] A "dewatering" facility uses centrifuges to extract water from liquied sewage sludge. The resulting "dewatered" sludge is known as "sludge cake." The contaminated water extracted is known as "centrate."

at each of those sites. Since the centrate generated at the dewatering facility would have to be further processed at the dewatering facility would have to be further processed at the YJWTP, this stage of the engineers' analysis took into account, in addition to the above-listed criteria, how the centrate would be transported back to YJWTP. The report concluded that the best option would be to construct a 30' x 50' addition to the YJWTP. Among the advantages of building the facility as an addition to the YJWTP, rather than at a different site, were the elimination of environmental risks that would have accompanied transporting liquid sewage sludge from and centrate back to the YJWTP and the low relative cost of constructing and operating the facility there.

Pursuant to 6 NYCRR §617.5(b), the engineers went on to complete a Full Environmental Assessment of the environmental effects of locating the dewatering facility at YJWTP. The YJWTP is situated alongside MetroNorth railroad tracks. Across the tracks lies a residential area known as Ludlow Park. As the Environmental Assessment noted, that area has been designated a "critical environmental area, Type I" pursuant to 6 NYCRR ss617.11. After examining any effects the proposed facility would have on land, water, air, plant and animal life, agricultural, aesthetic, historical and archaeological resources, recreational areas, and character of the surrounding neighborhood, the engineers environment" and recommend that the County issue, pursuant to E.C.L. §8-0109, a negative declaration stating that no environmental impact statement was called for.

On January 17, 1990, the engineers' study, the Full Environmental Assessment and supporting documentation were submitted to the Westchester County Board of Legislators. On January 29, the Board's Committee on Budget and Appropriations conducted an open hearing, at which one of the consulting engineers discussed the study and answered the Committee's questions. The next day, the full Board held another open hearing. Present were thirteen of the seventeen members of the Board and approximately 100 residents and representatives of the media. At that hearing, the consulting engineer described the procedures used and recommendations

made in the study. The Board also heard comments from some of the residents.[7]

On February 1, the Committee recommended to the Board that it find that the proposed facility would not have a significant effect on the environment and issue a negative declaration. The Committee report stated that its recommendation was based on, inter alia, information gathered in the engineers' study, the Full Environmental Assessment, the hearings and a review of the criteria listed in NYCRR §617.11.

On February 5, the Board issued a resolution reciting that "the County must now proceed with the preparations for implementing a dewatering facility, while it simultaneously investigates substitute methods, in order to meet the milestone deadlines set forth in the consent decree and avoid monetary penalties that could be imposed for failure to meet those

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[7] On the basis of a resident's observations at the meeting, petitioners assert that several of the Board members declared that they had not reviewed the engineers' rep or the Full Environmental Assessment. Even if such an assertion were relevant to our review, we would conclude, based on the following exchange at oral argument, that the particular assertion here put forward is too flimsy to credit.

MR. ZURHELLEN [For petitioners]: ... [T]here was a meeting in our neighborhood among I think all the members or most of the members of the committee and this person, Mr. Feinstein, asked them whether they had even read the two books worth of documents that were submitted by county, and only two of the fourteen or fifteen people there said they had. The others did not.

THE COURT: Did the others say they hadn't or just made no answer?

(Pause)

THE COURT: Off the record.

(Discussion off the record) [with Mr. Feinstein]

THE COURT: We will put on the record that the gentlemen in the audience said he was there at the meeting and most of them just kind of shook their heads, I couldn't make out whether they were annoyed at the question or answering the question, at least from his view.

MR. ZURHELLEN: I am advised by my client not only here but beforehand that there was an indication by the other members that they had not read the thing, whether it was a no or a shaking of the head, but Mr. Feinstein confirmed to me, the person who did the affidavit, that there was an indication of a negative.

THE COURT: Beauty is in the eye of the beholder and if you are going to a meeting expecting to be annoyed at what you see, you will get annoyed by what you see.

MR. ZURHELLEN: Could be.

Transcript of Oral Argument, May 30, 1990 at 15-16.

deadlines" and determining Environmental Assessment and "all other relevant supporting documentation," a negative declaration should be issued.

On March 22, 1990, a group of Ludlow Park residents opposed to further development of the YJWTP site, the mayor of the City of Yonkers and the state assemblyman for the Ludlow Park area commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, seeking to reverse the Board's determination. Respondents removed to this court, where the action was deemed related to the one in which the consent decree had been filed. On May 10, 1990, we determined to exercise jurisdiction pursuant to the All Writs Act, 28 U.S.C. §1651.

DISCUSSION

Under SEQRA, respondents were required to determine whether constructing a dewatering facility at YJSTP would have a "significant effect" on the environment and, if they so determined, to cause an environmental impact statement to be prepared. 6 NYCRR 617.1(c). In this Article 78 proceeding, we review respondent's determination that no such statement was required to decide whether or not it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion ..." C.P.L.R. s7803(3); Pell v. Board of Education (1974) 34 N.Y.2d 222, 230-32, 356 N.Y.S. 833, 839-40; Colton v. Berman (1967) 21 N.Y.2d 322, 329; 287 N.Y.S.2d 647, 651. We are required to conclude that the determination was proper if, in making it, respondents identified all areas of concern, took a "hard look" at the issues involved, and made a "reasoned elaboration" for the basis for their finding that the facility would have no significant environmental effects. Jackson v. New York State Urban Development Corp. (1986) 67 N.Y.2d 400, 417; 503 N.Y.S.2d 298, 305. Our role is not "to weigh the desirability of any action or choose among alternatives, but to assure that [respondents have] satisfied SEQRA, procedurally and substantively." Id.

Petitioners make four principal arguments against the respondents' determination. They contend that the Board (1) improperly based its findings on the study and the Full

Environmental Assessment rather than on reasons expressly enumerated in its resolution; (2) impermissibly took into account the deadlines established in the consent decree; (3) failed adequately to consider the effect of any additional traffic required to remove the sludge cake from the facility; and (4) did not give due deference to the fact that the Ludlow Park area has been deemed "Type I." We find these arguments to be without merit.

We follow Stewart Park and Reserve Coalition v. New York State Department of Transportation (3d Dept. 1990) 555 N.Y.S.2d 481, 484 in concluding that the Board's basing its resolution on the recommendations in the report and Environmental Assessment was entirely proper under Jackson, supra, in the absence of any indication that reliance on the engineering consultants was unreasonable.

We also see nothing improper in the resolution's recitation of the fact that the County, under the terms of the consent decree, was bound to meet certain deadlines. The Board, of course, could hardly have made its decision to construct a dewatering facility without reference to that fact.; The circumstance that, as petitioners insinuate, the deadlines in the consent decree might conceivably have provided respondents with a motive for not complying with the applicable legal standards is simply a red herring; the issue to be determined is whether or not they complied, not why they might not have complied.

Nor can we say that respondents failed to identify and take a hard look at the traffic issue. To the contrary, the Full Environment Assessment supported its conclusion that transporting the sludge cake from the facility would not result in the generation of traffic significantly above current levels with the following discussion:

The only traffic generated by the operation of the proposed facility will result from the transportation of the dewatered sludge to its disposal location and employees going to work and leaving work. Approximately six trucks per day will be required for the transportation of dewatered sludge from the YJTP to the disposal facility. Potential impacts to local traffic are expected to be insignificant based on he amount of traffic

generated as a result of two new employees and five additional truck [sic] entering and leaving the YJTP per day (Part 3, p. 11).

Petitioners insist that, by their calculations, a total of ten or twelve trucks—rather than five—will be required. Even if petitioners should turn out to have been correct in this prediction, it would not follow that the Board had arrived at its contrary determination, based on the engineers' study and the Full Environmental Assessment, arbitrarily, capriciously or in an abuse of discretion.

Finally, we note that the Ludlow Park area's designation as Type I, which was specifically noted in the Full Environmental Assessment and the negative declaration, did not command a determination that an environmental impact statement was required; it merely made such a determination "more likely." 6 NYCRR s617.11; Jaffe v. RCI Corp. (3d Dept. 1986) 119 A.D.2d 854; 500 N.Y.S.2d 427, 429. Where, as here, the County followed the appropriate procedural requirements for a Type I area, "the issue distills to whether its conclusion that the proposed project would have no significant impact on the environment is a rational one which is supported by the record." Id., citing Matter of Inland Vale Farm Co. v. Stergianopoulos (1985) 65 N.;Y.2d 718, 492 N.Y.S.2d 7. Based on our examination of the record, we find that it is.

CONCLUSION

We deny the petition.

SO ORDERED.

New York, New York
July 19, 1990

WHITMAN KNAPP, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE LUDLOW PARK HOME OWNERS ASSOCIATION, HENRY SPALLONE, AS MAYOR OF THE CITY OF YONKERS and G. OLIVER KOPPELL, AS ASSEMBLYMAN FOR THE 80TH ASSEMBLY DISTRICT,

Petitioners,

90 Civ. 22543

v.

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents.

May 10, 1990
4:15 p.m.

Before:

HON. WHITMAN KNAPP,
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE LUDLOW PARK HOME OWNERS ASSOCIATION, HENRY SPALLONE, AS MAYOR OF THE CITY OF YONKERS and G. OLIVER KOPPELL, AS ASSEMBLYMAN FOR THE 80TH ASSEMBLY DISTRICT,

Petitioners,

90 Civ. 2543

v.

THE COUNTY OF WESTCHESTER and THE WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents.

May 10, 1990
4:15 p.m.

Before:

HON. WHITMAN KNAPP,
District Judge

(Case called; both sides ready)

THE COURT: Good afternoon, ladies and gentlemen.

I must say there are extraordinarily good briefs on all sides and I really don't see that there's much point in arguing. You've said everything there is to be said, and I may well be in error, but I'm no longer in doubt that I should sustain the government's position that this is removable here under the All Writs Act.

It seems to me that the whole question is answered by point 4 of the petitioner's memorandum of law submitted to the Supreme Court of Westchester County and it says:

Point 4. The primary and more likely sole reason for the board of legislators' determination to dispense with an environmental impact statement was to avoid breaching an April 1990 deadline agreed to by Westchester County. This was not a permissible consideration in the board's determination as a matter of law.

Now, you just substitute the words "Agreed to by Westchester County" for the words "April 1990 deadline directed by the United States District Court for the Southern District of New York" and that is the question that is now before me and I can't think of a clearer case where this court has to decide that question.

Now, the petitioner has pointed out that in various places in the consent degree the parties are excused from acting if it is found that their conduct is in violation of state law, the decree would require them to do things in violation of state law.

Now, that was just put in there obviously at the insistence of defense counsel who were negotiating the decree to prevent the officials of Westchester County and the other defendants from finding themselves in the unhappy situation of having to elect between going to jail in New York State or in federal custody and that was not in any way intended to give the New York State Court the decision of whether they should go to jail.

And the question which a state judge would have to answer, just as I would have to answer, is to what extent is New York law preempted by the federal law. A state judge could answer that just as well as I could, maybe better. That's not the point. The point is it's my decree that has to be enforced and I have to decide questions of whether the state law is preempted

or whether it's not. Or maybe preemption is avoided. Maybe, according to state law, the existance of a federal decree, the state judge might disagree with the petitioner point that it is a permissible consideration, as a matter of state law.

In any event, that has to be decided by one court and it has to be decided by this court because it's this court's decree that has to be enforced and petitioners the deadlines in that decree were not just created by this whim of the parties or my whim, if I had anything to do with it. They were mandated by the act of Congress which this decree seeks to enforce.

Now, the law is adequately established by the Court of Appeals in the Yonkers case and the other cases cited by the respective parties and it seems to me the last thing the jurisprudence of the sate or national needs is another opinion on the subject. So, I will just make the words I have just spoken the opinion of the court, subject to anything anybody wants to say now to persuade me I was wrong.

MR. ZURHELLEN: Well, I guess that's up to me then because I'm on the losing side of your Honor's opinion. If I may, for a few minutes, I would like to address your question—

THE COURT: I look forward to your address because I was certainly impressed by your brief.

MR. ZURHELLEN: Thank you very much, your Honor.

I did my best with what little I had to work with. I confess I'm troubled and confused—and I don't mean just rhetorically—about what I consider to be the basic question presented in this application. All the parties, in so many words, seem to agree that the County of Westchester is to be bound and remain bound by state law. I'm reading from one of the briefs which I received by fax today. I think it's from the United States. Yes, it is. It says indeed the United States fully supports the proposition that Westchester should comply with state law.

I am genuinely at a loss, your Honor, to understand that if that proposition is correct, if Westchester County is to comply with state law, not with the caveat that it must also take into account or state law must take into account the effect of whatever might be decided on the consent decree, but state law, qua state law. Then I am at a loss to even articulate what this court might do in considering the Article 78 proceeding that a state court would not be bound itself to do.

THE COURT: Nothing is the answer to that question.

MR. ZURHELLEN: And if that is the answer to that question, your Honor, which I consider to be at least half the issue in this matter, then what basis can be articulated for the espoused position of the other parties in this proceeding that somehow or other the outcome of the Article 78 proceeding either has to take into account the consent decree in some fashion or that somehow the consent decree, its existence, its terms, its provisions, ought to affect the outcome of the Article 78 proceeding. Again, I want to emphasize I'm not just being rhetorical with my question. I don't understand how that could be. The position seems internally diametrically and definitionally inconsistent.

THE COURT: The simple thing is, obviously, I can be wrong. Obviously, a state judge can be wrong. Obviously, we both can be wrong. We can't have two people doing it. We have to have one person doing it and that's me.

MR. ZURHELLEN: If the state court were to decide the Article 78 proceeding.

THE COURT: The state court could decide it wrongly, I can decide it wrongly, but one person has to decide and that in the circumstances has to be me.

MR. ZURHELLEN: That I don't understand, your Honor.

THE COURT: Because my decree has to be enforced.

MR. ZURHELLEN: To what extent at all can the consent decree have an effect on the proceedings or the outcome of the Article 78 proceeding?

THE COURT: That's what the state judge would have to decide if he were deciding and that's what I'm going to have to decide when I decide it. There can't be two conflicting decisions on that question.

MR. ZURHELLEN: I agree with that.

THE COURT: And the only way we can avoid having two conflicting decisions on that question is to have one judge decide it.

MR. ZURHELLEN: I'm all for not having two judges decide and making inconsistent opinions.

THE COURT: But there's no way of stopping it except having only one judge do it.

MR. ZURHELLEN: And the notion that one judge and not two should do it does not, to me, militate that that judge be a federal judge rather than the state judge.

THE COURT: That's the issue.

MR. ZURHELLEN: That's exactly right, judge. If it's conceded, as it seems to be, that a state judge or your Honor must follow state law in determining the Article 78 proceeding and it is established I think in my papers and not denied by any of the parties that state law does not comprehend an effect on the outcome of the Article 78 proceeding because there is a federal consent decree—

THE COURT: That's not conceded. Certainly a state judge is going to have to decide whether state law—if this were to go to state court, the state judge would have to decide to what extent, if any, state law would have to yield to the injunction, federal injunction.

MR. ZURHELLEN: But even stated in those terms that becomes a matter of state law.

THE COURT: Exactly. That has to be decided by one person or else there would be chaos and chaos is what we don't like.

MR. ZURHELLEN: Rather than belabor a point that I confess it may be my failings that cause me not to understand it, I won't press the matter any further. And I don't think there's anything further to say, other than what I have said in my brief. So, thank you very much for your Honor's time.

THE COURT: I suppose I would ask the government to submit a decree and the decree should—I think I said originally when we were here before that I would grant the motion to remand and then bring it back. But I see from the way it's been done before it's simple just to keep it here.

MR. ZURHELLEN: We would not suggest that procedure be followed.

THE COURT: Also, it should enjoin the parties from taking any action in state court, not that that is necessary, but that is procedurally necessary, to be sure you have a right to appeal. You have a clear right to appeal from an injunction and if I just kept it here and didn't have an injunction there might be some doubt as to whether you could appeal. Obviously, you should have the right if you want to exercise it.

MR. ZURHELLEN: I think that would be my recommendation. To me, it's a difficult question.

THE COURT: So, the go ernment will present—

MR. SCHWARTZ: Yes, your Honor. I'll submit an order.

Your Honor, I just have a few points to mention. One, we would ask that the letter—

THE COURT: If you think there's anything else that I should say to make your appeal easier, you ask me, and if I agree with you, I'll say it.

MR. SCHWARTZ: Your Honor, we agree with the court that the essential question right now is that there should only be one judge hearing this matter and your Honor has had the consent decree in front of this court for sometime. Indeed, the predecessor matter, United States vs. Westchester, which was filed in 1979 under the Marine Protection Safe Waters Act was brought to stop ocean dumping by Westchester County and that's eleven years ago. It took an additional nine years for Congress to change the statute to make it strong enough to get to the place where we are now and the action that the government, in conjunction with the State of New York, filed last summer was under the new statute, the Ocean Dumping Banning Act. Your Honor and this court has had before it for over a decade the matters concerning Westchester's disposal of sewer sludge and now has before it the decree which demands this practice and that land disposal commence subsequent to December of 1991. As we stated in our reply papers, the United States fully supports the proposition that Westchester should comply with state law and indeed were the court to find that they did not it may well be that the remedy that your Honor would shape would be able to take into account the demands of the consent decree at the same time as taking into account the demands of state law and in our reply brief, page five, we have cited to that proposition in a state case under the state environmental statute issued in the Article 78 proceeding and we believe that the Yonkers case also supports the need for the court to be flexible in choosing a remedy.

I might note for the record that the Yonkers case itself does not in any way suggest that state law doesn't apply to the issues on that Article 78 proceeding.

The point at issue in the All Writs application is who should hear the dispute and we submit, as your Honor has found, that it is this court that should hear it.

I would ask that the letter submitted today by the National Resources defense counsel, which I believe was received by all the parties and Mr. Zurhellen received it as well, that this letter be made formally a part of the record in the event that the Ludlow Park Homeowners Association should elect to appeal.

MR. ZURHELLEN: I have no objection to that.

THE COURT: All right. That's the letter dated May 10, 1990.

MR. SCHWARTZ: From Nina Sankowitch, coastal project attorney. Perhaps I could submit it now and it could be made part of the record.

The only other matter I have to bring up concerns what happens now and I can await discussing that. I believe Westchester—

THE COURT: Does anyone else have anything to say about my order? I have no pride of authorship and you were willing to attack mine, the rest of you are willing to defend it. Does anyone think there's anything needed in the record to help you or the other side?

MS. BOWENS: I want to put on the record that the County of Westchester supports your motion in granting the United States motion under the All Writs Act. I also like to say in terms of Mr. Schwartz' concern about what happens next, as per your order the last time we were here, I have a verified answer prepared. It needs to be bound and served and that's all. But it is prepared.

THE COURT: That will be bound and served. You can serve it on the parties here.

MS. BOWENS: I can serve it tomorrow. It's too heavy to carry nine copies.

THE COURT: That will be served and filed tomorrow morning.

MR. SCHWARTZ: There is another motion pending and perhaps it might clarify the record—I think it's the government's view that your Honor need not reach that motion unless you're prepared to.

THE COURT: What motion are you referring to?

MR. SCHWARTZ: The motion that there is an alternative ground for this court to have jurisdiction over the Ludlow Park matter.

THE COURT: It seems to me that has become moot. The petitioner doesn't object to just leaving it here on the understanding that if If should be reversed the Court of Appeals would undoubtedly remand it. That doesn't need to have a motion remanding it and coming back. I thought originally the motion removing it here was not meritorious and we would have to remand it and bring it back. Everybody agrees that's nonsense.

MR. SCHWARTZ: The Yonkers case supports the proposition that that's not necessary.

MR. ZURHELLEN: As a matter of procedure, just so it's clear, I happen to agree with that. As long as it's clear also in the event we do appeal that our rights regarding that motion are preserved for appeal.

THE COURT: That's right. It's conceivable the court of appeals might find I was wrong in thinking there was no ground for removing it here except for the writ. In that event it would stay here on the original motion. If the Court of Appeals agrees that I'm right on that but I'm wrong on what I have ruled, it will go back. It will go wherever the court of appeals thinks it ought to go.

Well, then, assuming you file your answer tomorrow, as I understand New York practice—the question before me—is there any evidentially hearing necessary or can I decide it on the papers?

MR. ZURHELLEN: I think that's almost correct, but not quite, your Honor. Under state procedure, I believe given the form of the notice of the petition we filed we are entitled to a period of time, I believe seven days, after service of their answer or some period of time within which to reply to it, if we deem it necessary.

MR. SCHWARTZ: Your Honor, I'm not sure that it is correct that New York State procedural rules apply once the matter—

THE COURT: I said I thought we ought to apply them. It seems to me we have enough confusion. We have an Article 78

proceeding. It seems to me we ought to proceed in that proceeding under state rules and then we'll know where we're at. That seems the most sensible way to do it.

MR. ZURHELLEN: Let me perhaps make the following suggestion: If the answer is to be served on Friday, tomorrow, then could it be agreed, notwithstanding everybody researching what state law exactly provides, that I have an opportunity until the end of next week within which to file whatever responsive papers I feel appropriate.

THE COURT: That seems to be reasonable. Anybody object to that?

MR. ZURHELLEN: To address the merits or at least what happens next in terms of a hearing or not. If your Honor feels the papers provide sufficient authority for you to make a decision one way or another, then that's your Honor's prerogative.

THE COURT: Why don't we set it down fro 4:30 on Tuesday, a week from Tuesday.

MS. BOWENS: Your Honor, could you clarify for what purposes it would be set down a week from Tuesday?

THE COURT: A week from Tuesday arguing—both sides I say will either argue that they should have some evidence taken or that they won't. It will be the argument on whether or not I can dispose of the Article 78 proceeding on the papers before me and, if so, whoever thinks I can, will argue that I should dispose of it. Maybe everybody will agree that I can act on the papers before me. We'll have different views as to how I should act. Maybe one party will think there ought to be an evidentiary hearing. The other party will not think so and I'll decide whatever questions there are to decide.

Tuesday is a bad day. Wednesday the 23rd.

MR. SCHWARTZ: Your Honor, may I interject here for a moment? As things currently stand neither the United States or the State of New York are parties in the Article 78 proceeding. They are before your Honor as related case. There are no motions to intervene pending at this juncture. The United States is currently considering whether or not we will, indeed, wish to formally intervene in that proceeding. Conceivably other parties may also wish to intervene in that. In the interest

of resolving that issue, I would suggest respectfully after Mr. Zurhellen's responsive papers to the county's papers are submitted, perhaps, a week should be enough for the United States, perhaps the state of New York, to consider whether we wish to be heard on any of the issues raised on the merits in that proceeding.

THE COURT: So, you want the hearing adjourned a week?

MR. SCHWARTZ: No more than a week.

THE COURT: The 30th at 4:30. At that point, if I can decide the case on what's before me, I'll decide it. I may not decide it on that day, but I'll take it under advisement. If I decide we have to have an evidentiary hearing, we'll schedule it. The whole idea is to get the thing done as fast as we can. Is there anything else to be done today?

MS. BOWENS: Your Honor, I just want to clarify how long the petitioners have to reply.

MR. ZURHELLEN: Friday of next week.

THE COURT: Friday of next week.

Okay. I again wish to express my appreciation for the professional conduct of everybody involved.

(2)

No. 90-1787

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

In the Matter of the Application of The LUDLOW PARK HOMEOWNERS ASSOCIATION, HENRY SPALLONE as Mayor of the City of Yonkers, and G. OLIVER KOPPELL, as Assemblyman for the 80th Assembly District,

Petitioners,

vs.

THE COUNTY OF WESTCHESTER and the WESTCHESTER COUNTY BOARD OF LEGISLATORS,

Respondents,

UNITED STATES OF AMERICA and STATE OF NEW YORK,

Intervening-Respondents,

for an order pursuant to CPLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AND APPENDIX OF WESTCHESTER COUNTY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the United States District Court abused its discretion in accepting jurisdiction, pursuant to the All Writs Act, 28 U.S.C. §1651, over a New York State court proceeding which threatened to frustrate a Consent Decree entered by the District Court in an enforcement action brought by the United States, requiring Westchester County to cease dumping sewage sludge in the Atlantic Ocean by December 31 1991, as required by the Ocean Dumping Ban Act of 1988, 33 U.S.C. §§1414b and 1414c?

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CITATION OF OPINION BELOW

The Westchester County Respondents accept the Petitioners' citation of the opinion below which is reproduced in the Appendix attached to the Petition for Certiorari.

The Consent Decree and Enforcement Agreement, filed and entered in the United States District Court for the Southern District of New York in United States of America and State of New York v. County of Westchester and Westchester County Department of Environmental Facilities, (89 Civ. 5274 (WK)) and the District Court's Order, pursuant to 28 U.S.C. §1651, retaining jurisdiction over Ludlow Park Homeowners Association et al v. County of Westchester and Westchester

County Board of Legislators, are reproduced in the Appendix to this Brief.

STATEMENT OF THE CASE

A. Proceedings Below

This matter arose out of an action commenced in the United States District Court for the Southern District of New York by the United States of America seeking to enjoin the County of Westchester (County) from dumping sewage sludge into the Atlantic Ocean after December 31, 1991.* United States of America and State of New York v. County of Westchester and Westchester County

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*§1414b Ocean dumping of sewage sludge and industrial waste

(a) Termination of dumping

(1) Prohibitions on dumping Notwithstanding any other provisions of law -

...

(B) After December 31, 1991, it shall be unlawful for any person to dump into ocean waters ... sewage sludge ....

Department of Environmental Facilities, 89 Civ. 5274 (WK). Jurisdiction was asserted pursuant to 33 U.S.C. §1415(d) and 28 U.S.C. §§1331 and 1345. This action was settled in July 1989 by the entry of a Consent Decree and Enforcement Agreement, which among other things, required the County of Westchester to begin on-site construction of a sludge dewatering facility no later than October 1, 1990.*

The County immediately commissioned studies to determine the location, design and type of equipment for the dewatering facility. In February, 1990, the Westchester County

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*Consent Decree, Paragraph IV A.8. A complete copy of the Consent Decree is set forth in the Appendix to this Brief.

Board of Legislators, as lead agency under the New York State Environmental Review Act (SEQRA), [Article 8 of New York Environmental Conservation Law, 8 E.C.L. §8-0101 et seq.], and on the basis of a Full Environmental Assessment Form and numerous studies and reports submitted to it, resolved to locate the dewatering facility inside an already existing building at its Yonkers Joint Water Treatment Plant (YJWTP). It directed the Commissioner of Environmental Facilities to issue a Negative Declaration that the location of the facility at that site would have no significant impact on the environment.

Thereafter, the Petitioners herein commenced a proceeding in the New York State Supreme Court for Westchester

County pursuant to Article 78 of the New York Civil Practice Law and Rules, alleging that the issuance of the Negative Declaration was arbitrary, capricious and an abuse of discretion, and seeking a remand to the Board of Legislators and the preparation of an Environmental Impact Statement (EIS).

The County, pursuant to Paragraph XII of the Consent Decree, sought removal of the State court proceeding to the United States District Court, which had retained jurisdiction to resolve such disputes arising under its Consent Decree "as may be necessary or appropriate for its implementation".* The proceeding was removed and assigned to Judge Knapp as

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*Consent Decree, Paragraph XVIII

a related case to United States of America and State of New York v. Westchester County and Westchester County Department of Environmental Facilities, (89 Civ. 5274(WK)). At a hearing before Judge Knapp on May 10, 1990, the Petitioners indicated that they would move to remand the proceeding to the New York Supreme Court. The United States countered that it would move to retain jurisdiction pursuant to the All Writs Act, 28 U.S.C. §1651(a). Thereafter, Judge Knapp granted the government's motion to accept jurisdiction pursuant to the All Writs Act. A copy of this order is included in the Appendix to this Brief.

In July 1990 the District Court issued its Decision and Order on the

merits, dismissing Ludlow Park's petition, holding that the County followed the appropriate procedural requirements under SEQRA, and that its determination that the proposed facility would have no significant impact on the environment was rational and supported by the evidence.*

The petitioners appealed both the jurisdictional and environmental issues to the United States Circuit Court of Appeals for the Second Circuit, which affirmed both District Court orders in an unreported decision on February 19, 1991.

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*Petitioners have abandoned their appeal on the merits of the environmental question, which is not surprising considering that their major contention was that six to ten additional truck trips per day constituted a significant adverse impact on the environment.

B. The Facts

The Yonkers Joint Water Treatment Plant (YJWTP) occupies a thirty-five (35) acre site, approximately one half (1/2) mile long and three hundred (300) yards wide, covering 1,500,000 square feet on the Hudson River shoreline in an industrially zoned area. It has been in operation since 1955 and normally handles between 100,000,000 and 115,000,000 gallons of flow per day.

The existing building in which the dewatering facility will be housed is a single story 130' x 50' structure occupying approximately 1/2 of 1% of the total plant area, located a few hundred feet from both the existing sludge storage tanks and the primary

water treatment tanks. In order to accommodate the dewatering facility, the existing building is being altered by the addition of a second story and a 30' x 50' enclosed loading bay. Construction began as required by the Consent Decree on October 1, 1990 and has continued without interruption. The dewatering facility has now been substantially completed, and is scheduled to be placed in operation in accordance with the terms of the Consent Decree.

C. The Consent Decree

The Ocean Dumping Ban Act of 1988, 33 U.S.C. §§1414b and 1414c, provides that all ocean dumping of sewage sludge shall end by August 15, 1989, unless the agency doing the dumping enters into an Enforcement Agreement

pursuant to §1414b(c)(3) and obtains a temporary permit pursuant to §1412. In any event, all ocean dumping of sludge must end by December 31, 1991. Sections 1414b(c)(3) and (c)(4) set forth in considerable detail the provisions which must form a part of of the Enforcement Agreement.

The Consent Decree and Enforcement Agreement entered into by the parties in United States of America and State of New York v. County of Westchester and Westchester County Department of Environmental Facilities conforms to these requirements and contains, inter alia, the following provisions:

Paragraph IV - Implementation of Interim Land-Based Management of Sludge

1. completion of final equipment design - 12/31/89

2. advertise for sludge dewatering equipment - 2/1/90
3. completion of final design of facility - 4/1/90
4. award contract for equipment - 4/15/90
5. advertise for bids for all contracts - 5/15/90
6. award all contracts - 8/15/90
7. issue Notice to Proceed for construction of facility - 9/1/90
8. begin on-site construction of facility - 10/1/90
9. commence operation of sludge dewatering facility capable of processing 100% of County's sludge - 12/31/91

Paragraph V - Long Term Alternative Sludge Management

- seventeen separate steps beginning 1/1/89 and ending 9/15/95

Paragraph VI - Reports and Certifications

- requires, inter alia, monthly reports to the District Court, detailing the status and progress of all projects under Paragraphs IV and V

Paragraph X - Modifications

- must be subject to the approval or Order of the District Court

Paragraph XI - Appointment of Special Master

- "A special master shall be appointed and shall serve to monitor compliance with this Decree and the Agreement and to assist the Court in the enforcement thereof."

- He "shall submit quarterly written status reports to the Court, summarizing the progress on the tasks

listed in paragraphs IV and V ... and apprising the Court of problems that have or are expected to develop and of steps that are being or need to be taken to ensure timely completion of the tasks enumerated in paragraph IV and V and cessation of ocean dumping."

Paragraph XIII - Dispute Resolution - Any party may present a disputed matter to the Court "concerning any matter hereunder, including, without limitation, the schedules set forth in paragraphs IV and V."

Paragraph XIV - Satisfaction of Claims "The Enforcement Agreement contained in this Decree and Agreement is an Enforcement Agreement pursuant to MPRSA, 33 U.S.C. §1414b(c)(3). A violation of this Enforcement

Agreement is a violation of the MPRSA."* [emphasis added].

"Paragraph XVIII - Retention of Jurisdiction

"This Court shall retain jurisdiction to enforce the terms and conditions of this Decree and Agreement and to resolve disputes arising hereunder as may be necessary or appropriate for its implementation."

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*The Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§1401 et seq.

D. The Decision of the Second Circuit

In an unpublished opinion, filed February 19, 1991, the Court of Appeals held that it could overturn a decision to accept jurisdiction under the All Writs Act, 28 U.S.C. §1651 only if it found that the district court abused its discretion. Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942). The Court of Appeals affirmed the lower court's judgment because the record indicated that the lengthy process involved in producing an Environmental Impact Statement would prevent the County from complying with the provisions of the Consent Decree and from ending the ocean dumping of sewage sludge by December 31, 1991.

Since a district court might issue an order "to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained", United States v. New York Telephone Co., 434 U.S. 159, 172 (1972), the Court of Appeals for the Second District upheld the retention of jurisdiction because "a remand to the State Court would threaten the 'very essence' of the Consent Decree", which was the cessation of ocean dumping by December 31, 1991. See Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert. denied, 109 S.Ct. 1527 (1989).

On the merits, the Court of Appeals held that "the County's conclusion that the project would have no significant

respect on the environment is rational and supported by the record."

SUMMARY OF ARGUMENT

This case is not of special importance and the United States Court of Appeals' decision conflicts neither with decisions of this Court nor other Circuits.

Petitioners raised only two jurisdictional issues below: 1) that the preparation of an Environmental Impact Statement would not interfere with the provisions of the Consent Decree; and 2) that the District Court lacked subject matter jurisdiction under 28 U.S.C. §1441 and therefore should have remanded the proceeding to the State court.

The latter argument has now been abandoned. For the first time,

petitioners now cursorily contend, in this Court, that the exercise of subject matter jurisdiction in this case, is unconstitutional pursuant to Article III, Section 2 of the Constitution.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Petition does not present special or important reasons warranting review.

Petitioners assert that the United States Court of Appeals for the Second Circuit erroneously rejected their claims that the State court proceeding posed no threat to the implementation of the Consent Decree, and that the All Writs Act does not confer subject matter jurisdiction over their State court proceeding.

The Court of Appeals specifically held that: "The record indicates that the lengthy process involved in producing an EIS would result in substantial delay, preventing the County from complying with the series of interrelated milestone events

established by the Consent Decree to complete the phase-out of ocean dumping."

It further held that it might "only reverse a decision to issue an order under [the All Writs] Act if we find that the district court abused its discretion in reaching that decision. Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1943)."

Thus, the issues presented in this petition are whether the record contains sufficient evidence to support a finding that the preparation of an EIS would delay the completion of the project and whether the court, in this case and upon these facts, abused its discretion. These fact specific issues, while of interest to

the Petitioners, are not issues of broad application and do not affect the application of the All Writs Act in general, or enhance the scope of federal jurisdiction.

Even if the Petitioners' contentions were well-founded, this Court has never regarded its function as simply correcting a legal error perceived by disappointed litigants in a lower court decision.

The issues involved in this petition are so narrow and fact specific as to preclude this Court's decision from having any general application in the field of federal jurisdictional law.

B. There was sufficient federal concern for the District Court to retain jurisdiction

The District Court accepted jurisdiction over the New York State SEQRA proceeding, not because there was any inherent federal jurisdiction over the environmental questions, but because the very existence of the State court proceeding jeopardized the timely accomplishment of the major purpose of the Consent Decree - the cessation of all ocean dumping by December 31, 1991.

Any action which threatened to delay the milestone events specified in Paragraph IV of the Consent Decree, threatened a violation of the terms of the Enforcement Agreement, which in turn constituted a violation of MPRSA, 33 U.S.C. §1414(b) and (c) (see Consent

Decree, Paragraph XIV).

By the terms of the Consent Decree, Paragraph XVIII, the District Court retained jurisdiction "to enforce the terms and conditions of this Decree and Agreement and to resolve disputes arising hereunder as may be necessary or appropriate for its implementation." [emphasis supplied].

At the time the District Court was required to determine whether to retain jurisdiction over the State court proceeding, it was as yet unaware of the lack of merit to Petitioners' environmental objections. The District Court realized that if an EIS were required to be prepared, the milestone events of Paragraph IV, and the ultimate cessation of ocean

dumping, would be substantially delayed.

The District Court's familiarity with the matter, and its retention of jurisdiction* enabled it to resolve the environmental questions far more expeditiously than the State court. Furthermore, in the event that additional environmental studies were determined to be necessary, the mechanism of the Special Master provided a convenient vehicle for pinpointing the issues, expediting the acquisition of any additional information, preparing an EIS, and determining the sufficiency of the Environmental Impact Statement.

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*Paragraph XVIII of the Consent Decree

It begs the issue to argue, as Petitioners do, that the Consent Decree could have been modified to accommodate any delays occasioned by the State Court's resolution of the matter. The Ocean Dumping Ban Act of 1988 prohibited all dumping of sewage sludge into ocean waters after December 31, 1991. 33 U.S.C. §1414b(a)(1)(B). The object of the Consent Decree was not to facilitate a violation of federal law, but to set up procedures that would ensure compliance. Since the cessation of ocean dumping was of paramount importance, the District Court acted well within its discretion and in conformity with MPRSA and the Ocean Dumping Ban Act, in retaining jurisdiction over petitioners' SEQRA proceeding.

To hold otherwise would permit the frustration of orders previously issued by the District Court. United States v. New York Telephone Co., 434 U.S. 159 (1977).

C. There is no conflict between the Court of Appeals' decision below and the decisions of this Court or the other Courts of Appeal

This petition presents no special or important reasons for review by this Court. The chief cases cited by petitioners are those primarily relied upon by the respondents. United States v. New York Telephone Co., supra and Yonkers Racing Corp. v. City of Yonkers, 858 F.2d 855 (2d Cir. 1988), cert. denied, 109 S.Ct. 1527 (1989). The other federal cases cited all support federal jurisdiction and the enjoining of other state or federal court proceedings.

Both the District Court's exercise of discretion and the Court of Appeals' review and affirmance are rooted in prior Supreme Court decisions.

"This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained ...". United States v. New York Telephone Co., supra, at 172.

The "jurisdiction otherwise obtained" is the District Court's undoubted jurisdiction under 33 U.S.C. §1414b and §1415(d) to enforce the ban

on ocean dumping.

As this Court further declared:

"The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrong doing, are in a position to frustrate the implementation of a court order ...". Id at 174.

The laws of the United States require the County to stop dumping its sewage sludge in the Atlantic Ocean by December 31, 1991. The United States sued the County in the United States District Court to force it to obey the law. As a result, the parties entered into a Consent Decree which requires the County to construct a sludge

dewatering facility by December 31, 1991. The construction of this facility is critical because there is no land-based system for the disposal sewage sludge unless it has first been dewatered. The Petitioners commenced an action in State Court, which, if successful, would have made it impossible for the County to comply with the law (33 U.S.C. §1414b). This case involves not only the issue of non-compliance with the terms of the Consent Decree, but also a direct violation of federal law.

The facts of the instant case bring it squarely within the bounds of this Court's prior decisions. Petitioners have not even suggested any legal authorities to the contrary. A decision on the merits

of Petitioners' contentions would add nothing to the already established law in this field since the facts here presented do not require an extension of the law of federal jurisdiction to new areas.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 14, 1991

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA AND
STATE OF NEW YORK,

CONSENT DECREE
DECREE AND
ENFORCEMENT
AGREEMENT
89 Civ. 5274 (WK)

Plaintiffs,

v.

COUNTY OF WESTCHESTER and
WESTCHESTER COUNTY DEPARTMENT OF
ENVIRONMENTAL FACILITIES,

Defendants.
----------x

WHEREAS, the Maine Protection, Research, and Sanctuaries Act ("MPRSA"), 33 U.S.C. §§1401 et seq., as amended by the Ocean Dumping Ban Act of 1988, Title I of Pub. L. 100-688, makes it unlawful for any person to dump, or to transport for the purpose of dumping, sewage sludge into the ocean after August 14,

1989, unless such person has obtained a permit for such dumping from the United States Environmental Protection Agency ("EPA") under Section 1412 of the MPRSA and has entered into a compliance agreement or enforcement agreement for the phasing out of such ocean dumping under Section 1414b of the MPRSA; and

WHEREAS, Section 1414b of the MPRSA requires that any enforcement agreement thereunder provide for the cessation of ocean dumping of sewage sludge and that it provide for the development and implementation of a long-term alternative system for management of the affected person's sewage sludge and authorizes the use of interim measures before completion of the alternative systems; and

WHEREAS, the United States, EPA, the State of New York (the "State"), and the County of Westchester (the "County" or the "defendant") enter into this Consent Decree and Enforcement Agreement ("Decree and Agreement") to ensure the phasing out and termination of ocean dumping, and transportation for the purpose of ocean dumping, of sewage sludge pursuant to the Ban Act; and

WHEREAS, the County has agreed to undertake all measures set forth herein to cease ocean disposal of all of its sewage sludge by December 31, 1991 through implementation of interim measures; and

WHEREAS, the County has agreed to develop and utilize a long-term

alternative system to its current ocean disposal of sewage sludge which shall dispose and/or reuse the sludge by September 15, 1995; and

WHEREAS, the County contends that it will choose its long-term disposal solution after an evaluation of alternatives in accordance with all applicable law; and

WHEREAS, the parties agree that they shall make all reasonable efforts to expedite the defendant's efforts to comply with its obligations under this Decree and Agreement, including the review of permits, applications or approvals as provided in paragraph XVII herein; and

WHEREAS, the United States, EPS, the State and the defendant have each consented to the making and entering of this Decree and Agreement, without trial or adjudication of any issues of fact or law, and without this Decree and Agreement constituting an admission by the County with respect to any such issues; and the Court having considered the matter and being duly advised, and it being in the public interest, it is hereby ORDERED and DECREED as follows:

I. JURISDICTION

This Court has jurisdiction over the subject matter and over the parties hereto under 28 U.S.C. §1345, and 33 U.S.C. §1415. Plaintiff's complaint states a claim upon which relief may be granted against the defendant.

II. APPLICATION AND BINDING EFFECT

The provisions of this Decree and Agreement shall apply to and be binding upon all parties to this Decree and Agreement, their officers, directors, agents, servants, employees, successors, assigns, contractors, and all persons, firms and corporations in active concert or participation with them. Prior to any transfer of ownership or operation of the defendant's publicly owned treatment works, the defendant shall give written notice of this Decree and Agreement to any successor9s) in interest and shall simultaneously notify, in writing, EPA and the State that such notice has been given to each successor in interest.

III. PHASING OUT OF OCEAN DUMPING

The County recognizes that the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §1401, et seq. ("MPRSA"), as amended by the Ban Act, makes unlawful the disposal of sewage sludge in the ocean after December 31, 1991, and to that end the defendant has agreed to undertake all necessary steps, including the tasks outlined in paragraphs IV and V of this Decree and Agreement, to cease the ocean disposal of its sewage sludge. The Ban Act also requires that no ocean dumping or transportation for the purpose of ocean dumping sewage sludge shall be conducted after August 14, 1989, unless prior to such activity the defendant has obtained a new, effective ocean dumping permit under Section 1412 of the MPRSA.

In the event that the permit is stayed, the defendant shall comply with all terms and conditions of any permit issued, notwithstanding any challenge to the permit during the pendency of such challenge. Should ocean dumping continue under this Decree and Agreement beyond the effective term of the permit, and no new permit be issued, the conditions of the most recent permit issued to the defendant after May 31, 1989 shall continue to be complied with as conditions of this Decree and Agreement.

IV. IMPLEMTATION OF INTERIM LAND-BASED MANAGEMENT OF SEWAGE SLUDGE

A. The defendant shall implement dewatering measures for land-based management of sewage sludge in

compliance with the following milestone events:

1. Complete final design of the sludge dewatering equipment by December 31, 1989.

2. Advertise for sludge dewatering equipment by February 1, 1990.

3. Complete final design of the sludge dewatering facility by April 1, 1990.

4. Award contract for sludge dewatering equipment by April 15, 1990.

5. Advertise for bids for all contracts necessary to make the sludge

dewatering facility operable, by May 15, 1990.

6. Award all contracts necessary to make the sludge dewatering facility operable, by August 15, 1990.

7. Issue "Notice to Proceed" for on-site construction of the sludge dewatering facility by September 1, 1990.

8. Commence on-site construction of the sludge dewatering facility by October 1, 1990.

9. Substantially complete construction of and place into operation the sludge dewatering facility, capable of processing 100% of the County's sludge, by December 31, 1991.

Substantial completion shall be defined as the facility being capable of dewatering 100% of the County's sludge.

B. The defendant shall take the following additional measures to implement land-based interim sludge management:

1. The County shall have fully executed contracts, which shall include sufficient measures to ensure back-up capacity, necessary for the interim land-based management of the County's sewage sludge, by August 31, 1991.

2. The County shall cease ocean dumping of all sewage sludge by December 31, 1991.

C. Nothing set forth in Schedule IV.A shall preclude the County from implementing interim measures by other means provided that (i) the County shall cease ocean dumping of all sewage sludge by December 31, 1991, (ii) such substituted method, if any, provides for reliable land-based management of sewage sludge, and (iii) all parties agree to the substitution and a modification in accordance with paragraph X is obtained.

V. LONG-TERM ALTERNATIVE SLUDGE MANAGEMENT

The defendant shall implement a long-term alternative plan for the management and disposal of sewage sludge presently transported or dumped by the defendant. In implementing its long-term alternative system of

sewage sludge management and disposal,defendant shall comply with the following schedule:

1. commencement of detailed sludge management facility planning to identify the long-term alternative system to be used to ensure permanent phase-out and termination of ocean dumping of sewage sludge, by January 1, 1989.

2. Completion and submittal of detailed acceptable land-based sludge management facility plan for the selected long-term alternative system by March 1, 1991.

3. Initiate selection process for preparation of all final engineering designs and related specifications for

the long-term alternative system selected, by September 1, 1991.

4. Establishment of local pretreatment limit modifications as necessary for the long-term alternative system by January 31, 1992.

5. Award contract and commence preparation of all final engineering designs and related specifications for the long-term alternative system selected, by February 1, 1992.

6. Submit applications for all necessary local, state and federal permits for the long-term alternative system selected, by February 1, 1993.

7. Complete preparation of all

final engineering designs and related specifications for the long-term alternative system selected, by May 1, 1993.

8. Advertise for bids for the necessary equipment and construction of the long-term alternative system by June 1, 1993.

9. Acquire sites for the long-term alternative system selected, by June 1, 1993.

10. Secure all necessary permits for construction of the long-term alternative system selected, by August 1, 1993.

11. Award contracts for the

necessary equipment and construction of the long-term alternative system by September 1, 1993.

12. Issue "Notice to Proceed" for on-site construction of facilities for the long-term alternative system selected, by September 15, 1993.

13. Commence on-site construction of facilities for the long-term alternative system selected, by September 30, 1993.

14. Substantially complete construction of facilities and installation of equipment for the long-term alternative system selected, by June 1, 1995. Substantial completion shall be defined as completion such that

the facilities and equipment are capable of meeting their intended purpose.

15. Enforce full compliance by local industrial users with all local pretreatment limits by January 31, 1995.

16. Commence testing of the long-term alternative system by July 1, 1995.

17. Complete testing of the long-term alternative system and commence full operation of said system by September 15, 1995.

VI. REPORTS AND CERTIFICATIONS

A. Beginning with the second calendar month after execution of this Decree and Agreement by all parties, and continuing

monthly thereafter, the defendant shall submit in writing to the Court, the special master, the United States and the State at the addresses set forth in paragraph IX, a report and certification detailing the status and progrees of the projects under paragraphs IV and V for phasing out and terminating ocean dumping of sewage sludge and implementing interim measures and a long-term alternative system of sludge management. Such report and certification shall include a description of the work performed in the previous month and a projection of the work to be performed during the following twelve-month period pursuant to this Decree and Agreement.

B. Within five days after execution of this Decree and Agreement by all parties,

the defendant shall designate a responsible official to ensure that the implementation of this Decree and Agreement proceeds as smoothly and efficiently as possible and that the terms of this Decree and Agreement are complied with. In connection with the reports and certifications required to be submitted, such designated official shall certify that the defendant has met all schedule milestones in the prior month, and assess whether the defendant shall continue to meet all scheduled milestones set forth in paragraphs IV and V of this Decree and Agreement. Where such designated official is unable to so certify, such designated official shall identify: the noncompliance; the reasons therefor; the measures being taken to remedy the noncompliance; the

work remaining to be done to achieve full compliance, including a schedule for completion of such work, and the impact, if any, on compliance with the final schedule dates set forth in paragraphs IV and V; and an acceleration plan to ensure that the schedule dates in paragraphs IV and V shall be complied with. The reports and certifications shall be submitted for each month by certified mail, return receipt requested, by the fifteenth day of the following month. If defendant's report or certification indicates noncompliance, the report or certification shall also be submitted by telefax.

C. The EPA and the State shall confer quarterly to evaluate the compliance of the defendant with the schedules

established in paragraphs IV and V. Upon fifteen days notice from either EPA or the State, the defendant shall provide a properly informed and authorized representative for such conference to discuss progress and problems in the planning, design and construction of the alternative systems for sludge management and the interim measures needed to eliminate the ocean dumping of sewage sludge. The EPA and the State shall endeavor to schedule meetings at which the presence of defendant is requested in conjunction with a special master meeting or other meeting already scheduled.

D. The defendant shall submit to EPA and the State a quarterly report detailing the volume of sludge dumped in

the ocean during the preceding quarter, the amount of fees or penalties owing for that volume, the date and amount of payment of said fees or penalties to its trust account, the Clean Oceans Fund, State water pollution control revolving fund, and EPA, and copies of the checks for each payment made. This report shall be submitted on the fifteenth day of the second month following the end of the calendar quarter. The first report shall be submitted on November 15, 1989.

VII. STIPULATED PENALTIES

A. If the defendant fails to comply with any applicable requirements of paragraphs IV and V of this Decree and Agreement, the defendant shall pay stipulated penalties in the following amounts for each day of each and every

violation of said requirements:

Days of Non-compliance or Violation	Penalty for Violations Per Day
1-30	$ 1,000
31-60	$ 5,000
Beyond 60 Days	$10,000

Payments shall commence within ten days of demand and shall become due and payable monthly thereafter.

B. If the defendant fails to comply with any applicable requirements of paragraph VI of this Decree and Agreement, the defendant shall pay stipulated penalties in the following amounts for each day of each and every violation of said requirements:

Days of Non-compliance or Violation	Penalty for Violations Per Day
1-30	$100
31-60	$200
Beyond 60 Days	$500

Payments shall commence not later than thirty days from the date of the violation and shall become due and payable monthly thereafter.

C. The stipulated penalties set forth in subparagraphs A and B above shall begin to accrue on the day that performance is due or non-compliance occurs, and shall continue to accrue through the final day of correction fo the non-compliance. Each separate violation of this Decree and Agreement shall constitute a separate penalty event, and nothing herein shall prevent

the simultaneous accrual of separate penalties for separate violations of this Decree and Agreement. Fifty (50) percent of the penalty shall be paid to the State. Penalties due to the United States shall be paid by tendering a check in the appropriate sum, payable to "Treasurer of the United States," and sent by certified mail, return receipt requested, to the United States Attorney for the Southern District of New York with a copy to EPA and the New York State Department of Environmental Conservation ("NYSDEC"). Penalties due to the State shall be paid by tendering a check in the appropriate sum, payable to "Comptroller of the State of New York," and sent by certified mail, return receipt requested, to the Office of the State Comptroller, Alfred E.

Smith Office Building, Swan Street, 6th Floor, Albany, New York 12236, with copies sent to NYSDEC, New York State Department of Law ("NYSDOL") and EPA. Interest shall accure on any stipulated penalty not paid when due at the rate established by the Department of the Treasury under 31 U.S.C. §3717.

D. Except for stipulated penalties resulting from defendant's failure to comply with the milestone events set forth in paragraphs IV.A.8, IV.A.9, IV.A.B.1, IV.B.2, V.11, V.14 and V.17, any stipulated penalties incurred by defendant for failure to achieve any other milestone date in the schedules set forth in paragraphs IV or V shall be forgiven upon the defendant's timely achievement of the next subsequent

milestone date in that schedule, provided that the following conditions are met. Such stipulated penalties shall be paid timely and within 10 days of demand by EPA or the State by tendering a check in the appropriate sum to the agent of an escrow account to be established for each schedule hereunder. If defendant thereafter demonstrates compliance with the next subsequent milestone event set forth in the schedule, then all stipulated penalties paid and held in escrow for violation of the preceding missed milestone event shall be returned to the defendant. If, however, the defendant fails to comply with the next subsequent milestone event set forth in the schedule, then the escrow agent shall pay the entire balance of the escrow account for that

schedule, including all interest earned thereon, to the "Treasurer of the United States" and the "Comptroller of the State of New York" in accordance with paragraph VII.C hereof. Nothing contained herein shall relieve the defendant of any obligation to pay any stipulated penalties hereunder that the defendant fails to pay into the escrow account or which the escrow agent fails to pay to the United States and the State.

E. In the event that defendant claims that a force majeure event, as defined in paragraph XII of this Decree and Agreement, has occurred such that no stipulated penalty is due for a missed milestone date, defendant shall pay the stipulated penalty into the escrow

account in accordance with the procedure set forth in VII.D above and such payment shall be held by the escrow agent pending resolution of the defendant's claim of force majeure pursuant to paragraphs XI, XII and XIII. If it is determined that no stipulated penalty is due, then all stipulated penalties paid and held in escrow for the violation of the milestone dates at issue shall be returned to the defendant. If, however, it is determined that the stipulated penalty is due because the delay was not caused by a force majeure event, then the escrow agent shall pay the entire balance of the escrow account for that schedule, including all interest earned thereon, to the "Treasurer of the United States" and the "Comptroller of the

State of New York" in accordance with paragraph VII.C hereof.

F. In addition to the stipulated penalties set forth above and the fees and penalties established by the Ban Act, the civil penalties and other relief provided by the MPRSA at 33 U.S.C. §1415 for violations of permits issued under 33 U.S.C. §1412 and of this Decree and Agreement shall apply and remain in effect.

G. In the event of failure to pay stipulated penalties, as set out above, this matter may be referred to the United States Attorney and the State Attorney General for collection. Defendant shall be liable for plaintiffs' expenses, including

attorney's fees, in such collection action.

VIII. STATUTORY FEES AND PENALTIES

A. In accordance with Sections 1414b(b)(1) and 1414b(d)(1) of the MPRSA, the defendant shall pay the following fees and penalties, separate and apart from any penalties that it may be liable for under paragraph VII, for the sewage sludge it dumps in the ocean:

Between August 15, 1989 and December 31, 1989 inclusive	A fee of $100 per dry ton
During 1990	A fee of $150 per dry ton
During 1991	A fee of $200 per dry ton

The quantity of dry tons shall be based upon the monthly average of percent solids for the sludge dumped, or weighted average of percent solids if

defendant has more than one wastewater treatment plant. Penalties for dumpingsewage sludge or transporting sewage sludge for the purpose of dumping it in the ocean shall be calculated for any dumping after December 31, 1991 as set out in Section 1414b(d)(1) of the MPRSA. Such penalties are mandatory and independent of any civil penalties assessed or collected pursuant to Section 1415 of the MPRSA and of any stipulated penalties assessed or collected pursuant to this Decree and Agreement.

For the purpose of determining the applicable per-dry-ton fee or penalty, the date and time of initiation of discharge from the vessel (as reported on the Ocean Dumping Notification Form)

shall be used.

B. Payments of statutory fees andpenalties assessed under paragraph VIII.A shall be made on a quarterly basis, on the last day of the month following the end of a calendar quarter. The first payment, for sewage sludge dumped or for dumping initiated during the calendar quarter ending September 30, 1989, shall be made by October 31, 1989. For the purpose of determining the calendar quarter in which sludge was dumped, the date and time of initiation of discharge from the vessel (as reported on the Ocean Dumping Notification Form) shall be used.

C. The defendant shall establish a trust account pursuant to Section

1414b(e) of the MPRSA for the payment and use of that portion of the fees and penalties established by the Ban Act that are to be deposited in this trust account. The defendant must receive written approval from EPA of its trust account prior to August 14, 1989. No sewage sludge may be transported for the purpose of ocean dumping or ocean dumped under this Decree and Agreement unless prior to such transport or disposal the defendant has secured approval of its trust account by EPA.

D. Defendant shall pay fees and penalties in accordance with Sections 1414b(b)(2)(c) and 1414b(d)(2)(c)(i) into the Clean Oceans Fund established under Section 1414b(c)(5) and the water pollution control revolving fund

established under Title VI of the Federal Water Pollution Control Act. In the event that the State has not established a Clean Oceans Fund or water pollution control revolving fund by February 28, 1990, fees and penalties required to be paid to the Fund or revolving fund by defendant shall be paid to EPA pursuant to Section 1414b(b)(5).

E. In accordance with the MPRSA, Sections 1414b(b)(2) and 1414b(d)(2), fees shall be paid as set forth below to the following recipients for each dry ton of sewage sludge dumped in the ocean:

Fee And Penalty Per Dry Ton Dumped

Year in Which Sludge Was Dumped	Recipients: EPA	Trust Account	Clean Oceans Fund*	State Water Pollution Control Revolving Fund
1989	$15.00	$ 85.00	--	--
1990	15.00	127.50	83.75	83.75
1991	15.00	170.00	7.50	7.50

*If established; if not, to EPA pursuant to paragraph VIII.D.

After December 31, 1991, payment and distribution of penalties shall be computed and paid in accordance with Section 104B(d)(2) of the MPRSA.

F. Fees and penalties paid to EPA under paragraph VIII.E shall be paid by check made payable to the "Treasurer of the United States," and delivered by certified mail, return receipt requested, to EPA. Fees and penalties paid to the Clean Oceans Fund shall be paid by check made payable to the "Comptroller as Custodian of the Clean Oceans Fund" and delivered by certified mail, return receipt requested, to the State. Fees and penalties paid to the state water pollution control revolving fund shall be paid by check made payable to the "New York State Environmental

Facilities Corporation as Custodian of the state water pollution control revolving fund" and delivered by certified mail, return receipt requested, to the State. Fees and penalties paid to the trust account shall be paid to the trustee for said account. For each payment recipient, if a payment is not received on or before the day on which payment is to be made pursuant to paragraph VIII.B, interest will be assessed against defendant at the annual rate established by the Secretary of the Treasurey pursuant to 31 U.S.C. §3717, on the overdue amount from the day on which it was due throught the date of payment. Failure to pay the fee or penalty in full according to the above provisions will result in referral of this matter to

the United States Attorney and the State Attorney General for collection. Interest on late payments shall be paid to EPA for untimely payments to EPA or the defendant's trust account and tothe State for untimely payments to it or to its revolving fund or Clean Oceans Fund. Interest on late payments shall be deposited in the U.S. Treasury or State Treasury as appropriate as general funds. Defendant shall be liable for plaintiffs' expenses, including attorneys' fees, in such collection action(s).

G. In the event of defendant's failure to make full payment of the fee or penalty to the trust account in accordance with paragraph VIII of this Decree and Agreement within thirty days

of the date on which it was due or defendant's failure to use amounts withdrawn or received from the account in accordance with Section 1414b(e) of the MPRSA and this Decree and Agreement, EPA may, upon finding such a failure to have occurred and upon fifteen business days written notice, direct the trustee of the trust account to pay the balance of the amount in the trust account to the State for use in accordance with Section 1414b(e)(2)(C) of the MPRSA. Pending final resolution of any district court challenge, the trustee shall continue to hold the funds in the trust account.

H. Fees and penalties paid to the trust account, the State, the Clean Oceans Fund, or the state water

pollution control revolving fund shall be used subject to the restrictions of Section 1414b(c)(5), (e) and (f) of the MPRSA. The defendant shall conduct audits on an annual basis to establish that such fees and penalties were paid to the appropriate accounts. The defendant shall obtain the services of an auditor to conduct separate audits, on an annual basis of defendant's expenditures from the trust account and from funds provided to it from the Clean Oceans Fund, to demonstrate compliance with Section 1414b(c)(5) and (e) of the MPRSA. Costs incurred by the defendant pursuant to this Decree and Agreement and paid from the trust account and from funds provided to defendant from the Clean Oceans Fund shall be necessary and reasonable, and allocable to the

projects allowed by Sections 1414b(c)(5) and (e). The defendant may look to the applicable cost principles on OMB Circular A-87 (46 Federal Register 9548 (1981)) for guidance in determining allowable costs. Such audit reports required of the defendant shall be submitted to EPA and the State within 90 days after the end of each calendar year.

I. Upon execution of this Decree and Agreement and continuing biannually thereafter, the defendant shall submit to the Regional Administrator of EPA, Region II, and the State a scope of work for each project that will require funding from the trust account in the following six-month period. The first submission shall be due by August 30, 1989 and shall cover the period from

August 15, 1989 through December 31, 1989. Subsequent submissions shall be due 60 days prior to commencement of the next six-month period (i.e., October 30, 1989, April 30, 1990, etc.). Each scope of work will consist of a description of the major activities to be funded in each project, the required level of funding for each such activity and a cumulative six-month payment schedule based upon projected costs to be incurred.

J. The Regional Administrator of EPA, Region II, will approve or disapprove the scope of work and level of funding for the major activities. EPA will notify the trustee of the trust account, the State and the defendant of EPA's approval or disapproval of the

scope of work and level of funding and will provide the trustee with a list of the approved activities, funding levels and associated payment schedule. If EPA fails to act on the defendant's proposed scope of work and payment schedule within 60 days of its receipt, the defendant may submit the scope of work and payment schedule to the trustee together with a certification that EPA has failed to disapprove use of the trust account as required in Section 1414b(e)(2)(A).

K. The defendant may request funds from the trustee for immediate cash disbursements based upon costs incurred. The trustees will disburse funds in accordance with the scope of work and approved payment schedule. If

the defendant anticipates that funding needs will exceed the levels in the approved scope of work, the defendant may seek approval for such additional funding from EPA.

IX. NOTIFICATIONS

A. Except as specified otherwise, when written notification to or communication with the United States, EPA, the State or the defendant is required by the terms of this Decree and Agreement or when payment of a fee or penalty is to be made, it shall be sent by certified mail, return receipt requested, and addressed as follows:

As to the United States of America:

United States Attorney's Office
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Attention: Chief, Environmental
Protection Unit

United States Department of
Justice
Land & Natural Resources Division
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Attention: Chief, Environmental
Enforcement Section

United States Environmental
Protection Agency
Office of Regional Counsel
26 Federal Plaza
New York, New York 10278
Attention: Chief, Water, Grants
and General Law Branch

As to EPA Region II:

Financial Management Branch
Policy and Management Division
United States Environmental
Protection Agency
26 Federal Plaza
New York, New York 10278
(for payment of fees or penalties)

Water Management Division
United States Environmental
Protection Agency
26 Federal Plaza
New York, New York 10278
Telephone No.: (212) 264-2513
Telefax No.: (212) 264-2194
(for all other notifications or
communications)

As to State:

Office of the State Comptroller
Alfred E. Smith Office Building
Swan Street, 6th Floor
Albany, New York 12236
(for payment of fees or penalties to Clean Oceans Fund and stipulated
penalties with copies to NYSDEC and NYSDOL)

New York State Environmental Facilities Corporation
50 Wolf Road
Albany, New York 12233
(for payment of fees or penalties to state water pollution control revolving fund with copies to NYSDEC and NYSDOL)

Commissioner
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233
(for all notifications or communications and copies of payment
of all fees and penalties)

New York State Department of Law
Environmental Protection Bureau
120 Broadway
New York, New York 10271
(for all notifications or communications and copies of payment of all fees and penalties)

As to defendant:

Westchester County Department of
Environmental Facilities
400 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
Telephone No.: (914) 285-2455

Westchester County Department of
Environmental Facilities
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601
Telephone No.: (914) 285-2690

Notifications to or communications with the United States, EPA, the State or the defendant shall be deemed submitted on the date they are telefaxed or postmarked and sent by certified mail, return receipt requested, whichever occurs later.

B. Reports required to be submitted pursuant to paragraph VI shall be signed by the responsible official of the defendant designated pursuant to

paragraph VI.B and shall include the following certification statement: "I certify that the information contained in or accompanying this submission is true, accurate, and complete."

X. MODIFICATION

Except as provided for herein, there shall be no modification of this Decree and Agreement without written approval of all of the parties to this Decree and Agreement, subject to the approval of the Court, or Order of the Court. Nothing herein shall be construed to limit any party's rights pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

XI. APPOINTMENT OF SPECIAL MASTER

A. Pursuant to the provisions of the Rule 53 of the Federal Rules of Civil Procedure and Rule 19 of the Civil Rules of the United States District Court for the Southern District of New York, a special master shall be appointed and shall serve to monitor compliance with this Decree and the Agreement and to assist the Court in the enforcement thereof. This special master shall have the following duties, responsibilities and powers:

1. The special master shall monitor the progress of the defendant in carrying out the tasks enumerated in paragraphs IV and V. To this end the special master shall attend all progress meetings concerning the above-referenced

schedules and receive copies of all progress reports and correspondence. The special master shall copy all his/her correspondence and other written communications with any party to all parties, and shall notify all parties of any physical inspections or site visits he/she conducts. The special master shall minimize ex parte contacts with any party.

2. The special master shall submit quarterly written status reports to the Court, summarizing the progress on the tasks listed in paragraphs IV and V and defendant's compliance with this Decree and Agreement, and apprising the Court of problems that have or are expected to develop and of steps that are being or need to be taken to ensure

timely completion of the tasks enumerated in paragraphs IV and V and cessation of ocean dumping.

3. The special master shall attempt to anticipate and avoid potential problems. In carrying out his/her responsibilities under this paragraph XI, the special master may, upon adequate notice, require submissions from the parties, attendance at meetings and/or participation in hearings. The special master may require the production of an rule upon the admissibility of evidence and has the authority to put witnesses under oath and may examine them and call parties to the action and examine them under oath. All hearings before the special master be on the record.

4. The parties may in the first instance apply to the special master with respect to (i) enforcement of this Decree and Agreement, including stipulated penalties as provided for in paragraph VII, (ii) disputes arising under the terms of the Decree and Agreement, or (iii) any proposed amendment or modification of paragraph IV or V of this Decree and Agreement. The special master may make recommendations in accordance with paragraph XII concerning such proposed amendments or modifications.

5. The special master shall make his/her recommendations provided for in paragraph XI.A.4 in the form of a report filed with the Court within 30 days of receipt of stipulations or submissions

by the parties or within 30 days of the conclusion of a hearing, if any.

B. The special master shall have the following minimum qualifications:

1. A law degree; and

2. Extensive experience in the environmental law field and/or in the building or mangement of large public construction projects or programs; and

3. Experience involving dispute resolution.

C. No later than September 30, 1989, the parties shall submit to the Court the names in order of preference to be considered for appointment as special master. If the parties cannot agree on such names, they shall each

submit a separate list of candidates by September 30, 1989. The Court may select a special master from the names submitted or may conduct such proceedings as it requires to make a selection.

D. compensation for the special master shall be paid by the defendant at a rate to be fixed by the Court. The special master may make interim applications for compensation from time to time during the period of his/her performance and may seek compensation or reimbursement for reasonable costs and expenses incurred in fulfilling his/her obligations under this Decree and Agreement, including all necessary expert and staff assistance. The special master shall not retain any

experts without first seeking approval of all of the parties sand such approval shall not be unreasonably withheld.

E. All reports of the special master shall be filed with the Court. Except for status reports pursuant to paragraph XI.A.2, all reports and recommendations, including any facts therein, shall be reviewable de novo by the Court. Within 10 days after being served with any such report, any party may file written comments. Application to the Court for action upon the report and upon comments thereto shall be by motion on notice, pursuant to the Court's rules. The Court after hearing may accept any recommendations contained in the report or may modify it or may reject it in whole or in part or may

receive further evidence or may recommit it to the special master with instructions. Reports of the special master shall not be deemed adopted by the Court except upon order of the Court.

XII. FORCE MAJEURE

A. A force majeure event is an event (in accordance with applicable case law, including but not limited to, Act of God; commercial impracticability (i.e., extraordinary costs); contractor or supplier default; failure of a federal or state regulatory agency to issue any necessary permit or approval in a timely fashion where the defendant has timely submitted in good faith a complete and legally sufficient application and all necessary supporting information in accordance with all

applicable laws and regulations; or a judicial injunction issued by a court of competent jurisdiction directed against work actually being performed in furtherance of sludge treatment and disposal facilities, provided that the defendant has exercised due diligence and best efforts in seeking removal to this court and in resisting such injunction, including appeals, and the defendant has acted in accordance with applicable statutes and regulations) that is beyond the control of the defendant and which causes a delay in implementing any of the measures required by this Decree and Agreement. If such event occurs, defendant shall be entitled to a modification of the schedule milestones to the extent that such event was beyond the control of the

defendant. The defendant bears the burden of establishing that the event was beyond its control and of demonstrating the amount of delay that is necessary because of the force majeure event. As a condition precedent to obtaining any relief under this provision, defendant shall notify the Court and all the parties in writing that a force majeure event has occurred no later than 90 days after the date defendant knew or should have known of the occurrence of any force majeure event.

B. The notice to EPA and the State, required above, shall include, to the extent such information is available at the time of such notification:

1. The anticipated length of time of the delay;

2. The cause of the force majeure event;

3. Measures taken to minimize the delay including time table for implementation of any such measures;

4. Proposed date by which subsequent schedule milestone will be achieved; and

5. Activities that can be taken to minimize the impact of the force majeure event on the overall schedule.

C. If all the parties agree that a failure to comply with any requirement of this Decree and Agreement, including a schedule milestone in paragraph IV or V was caused by a force majeure event,

the parties may seek an amendment to this Decree and Agreement containing such proposed modifications, including revised schedule milestones as may be necessary, and no stipulated penalties shall be incurred. If the parties agree that an extension is necessary, the schedule of milestone dates under paragraphs IV or V, shall be extended for the period of time caused by the force majeure event. In the event that revision of the schedule milestones is necessary, the defendant agrees to make every effort to ensure that the milestone events set forth in paragraphs IV.A.8, IV.A.9, IV.B.1, IV.B.2, V.11, V.14 and V.17 are not extended.

D. If the parties cannot agree that a failure to achieve milestone

dates was beyond the control of the defendant, the defendant may, within 30 days following the missed milestone event, apply to the special master for a recommendation as to whether all or part of the delay was excusable due to a force majeure event.

E. If, for any reason, the defendant fails to achieve any schedule milestones established in paragraph IV or V and the parties cannot agree that the remainder of the schedule milestones will be affected, or how they will be affected, then the defendant may, within 30 days following the missed schedule milestone, petition the special master for a recommendation concerning the failure to achieve the milestone date(s) requires a revision of all or part of

the remainder of the schedule milestones as established in paragraphs IV or V. Whenever a milestone is missed, the defendant shall exercise its best efforts to recoup all lost time, including, where appropriate, the payment of extraordinary expenses for overtime, double shifts or additional contractors or consultants or alternative methods.

XIII. DISPUTE RESOLUTION

Nothing in this Decree and Agreement shall prevent any party from presenting a disputed matter to the Court, at any time, concerning any matter hereunder, including, without limitation, the schedules set forth in paragraphs IV or V. The filing of a petition asking the Court to resolve a dispute shall not by

itself extend or postpone any obligation of the defendant under this Decree and Agreement, provided further that nothing herein shall prevent an affected party from applying to the Court, upon notice to all parties, for a stay of relief authorized or directed by this Decree and Agreement.

XIV. SATISFACTION OF CLAIMS

Full compliance with this Decree and Agreement shall constitute full satisfaction of all claims alleged herein. The Enforcement Agreement contained in this Decree and Agreement is an Enforcement Agreement pursuant to the MPRSA, 33 U.S.C. §1414b(c)(3). A violation of this Enforcement Agreement is a violation of the MPRSA. The EPA and State do not, by their entry into

this Enforcement Agreement, warrant or aver in any manner that the defendant's complete compliance with this Enforcement Agreement will result in compliance with the provisions of the MPRSA, 33 U.S.C. §1401 et seq., including the Ban Act. Notwithstanding EPA's and the State's review and approval of any plans formulated pursuant to this Enforcement Agreement, defendant shall remain solely responsible for compliance with the terms of the MPRSA, this Decree and Agreement, and defendant's ocean dumping permit.

XV. COMPLIANCE WITH OTHER LAWS

This Decree and Agreement in no way affects or relieves the defendant of responsibility to comply with any other

Federal, State, or local law or regulation. Nothing contained in this Decree and Agreement shall be construed to prevent or limit the EPA's or State right to obtain penalties or injunctive relief under the MPRSA or other federal or state statutes or regulations.

XVI. RESERVATIONS OF RIGHTS

The EPA and State do not waive any rights or remedies available to them for any violation by defendant of Federal or State laws, or regulations following completion of the requirements of this Decree and Agreement.

XVII. REVIEW OF PERMIT APPLICATIONS

The defendant, EPA and State shall take all possible steps to expedite the submission and review, as appropriate,

of any permits, applications or approvals needed for completion of the interim measures and long-term alternative system(s) set forth in paragraph IV and V.

XVIII. RETENTION OF JURISDICTION

This Court shall retain jurisdiction to enforce the terms and conditions of this Decree and Agreement and to resolve disputes arising hereunder as may be necessary or appropriate for its implementation.

XIX. TERMINATION

This Decree and Agreement shall terminate when the defendant has complied with all applicable requirements of this Decree and Agreement and the United States and the

State have so certified.

The parties consent to entry of this Decree and Agreement without further notice.

For the United States:

s/ July 28, 1989
DONALD A. CARR Date
Acting Assistant Attorney
General
Land & Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

BENITO ROMANO
United States Attorney for
the Southern District of
New York

By: s/ August 3, 1989
RICHARD M. SCHWARTZ Date
GABRIEL W. GORENSTEIN
Assistant United States
Attorneys
One St. Andrews Plaza
New York, New York 10007

July 26, 1989
BRUCE C. BUCKHEIT Date
Senior Counsel
Environmental Enforcement
Section
Land & Natural Resources
Division

U.S. Department of Justice
Washington, D.C. 20530

For the United States Environmental Protection Agency :

s/ July 31, 1989
WILLIAM J. MUSZYNSKI Date
Acting Regional Administrator
Region II
U.S. Environmental
Protection Agency
New York, New York 10278

s/ July 28, 1989
EDWARD E. REICH Date
Acting Assistant Administrator for Enforcement and
Compliance Monitoring
U.S. Environmental Protection
Agency
Washington, D.C. 20460

July 26, 1989
CHARLES E. HOFFMAN Date
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental
Protection Agency

Region II
26 Federal Plaza
New York, New York 10278

s/ 8/3/89
ANN L. GOLDWEBER DATE
Assistant Attorney
General
New York State
Department of Law
120 Broadway
New York, New York

s/ July 26, 1989
THOMAS C. JORLING Date
Commissioner
New York State Department
of Environmental Conser-
vation
50 Wolf Road
Albany, New York 12233

For Westchester County:

7/31/89
WILLIAM G. BORGHARD Date
Commissioner
Westchester County
Department of Environmental
Facilities
600 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

July 31, 1989
MARILYN J. SLAATTEN Date
Westchester County Attorney

600 Michaelian Office
Building
148 Martine Avenue
White Plains, New York 10601

Dated: New York, New York
August 7, 1991

s/Whitman Knapp
United States District Judge
Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA AND
STATE OF NEW YORK,

Plaintiffs,

v.

COUNTY OF WESTCHESTER and
WESTCHESTER COUNTY DEPARTMENT OF
ENVIRONMENTAL FACILITIES,

Defendants.
----------x

CONSENT DECREE
DECREE AND
ENFORCEMENT
AGREEMENT
89 Civ. 5274 (WK)

The United States having moved for relief pursuant to the All Writs Act, 28 U.S.C. §1651(a), and this matter having been heard by this Court on Mya 10, 1990, and upon all prior proceedings heretofore had herein, IT IS HEREBY ORDERED as follows:

1. Pursuant to 28 U.S.C. §1651(a), this Court retains jurisdiction over the

Article 78 proceeding entitled Ludlow Park Homeowners Assoc. v. County of Westchester, which has been removed to this Court as 90 Civ. 2543 (WK) (S.D.N.Y.).

2. Pursuant ot 28 U.S.C. §1651(a), this Court enjoins any further litigation in state court of said Article 78 proceeding.

Dated: New York, New York
May 24, 1990

_____

UNITED STATES DISTRICT JUDGE

(3)

No. 90-1787

Supreme Court, U.S.
FILED
JUL 22 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LUDLOW PARK HOMEOWNERS ASSOCIATION, INC., ET AL.

v.

COUNTY OF WESTCHESTER, NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

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Southern District of New York

RICHARD M. SCHWARTZ
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New York, New York 10007

QUESTION PRESENTED

Whether the district court properly took jurisdiction of this proceeding under the All Writs Act, 28 U.S.C. 1651.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1787

LUDLOW PARK HOMEOWNERS ASSOCIATION, INC., ET AL.

v.

COUNTY OF WESTCHESTER, NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not reported, but the decision is noted at 930 F.2d 909 (Table). The district court opinion (App., *infra*, 1a-9a)[1] is reported at 741 F. Supp. 1126.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1991. The petition for a writ of certiorari was filed on May 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] Because the version of the district court opinion reprinted at Pet. App. A5-A11 contains several material omissions, we have reprinted the opinion in its entirety as an Appendix to this brief.

STATEMENT

This case arises out of a proceeding commenced in state court by petitioners (Ludlow Park Homeowners Association, Henry Spallone as Mayor of the City of Yonkers, and G. Oliver Koppell as Assemblyman for the 80th Assembly District) under Article 78 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1991), challenging respondent Westchester County's decision to install sludge dewatering equipment at the existing Yonkers Joint Wastewater Treatment Plant without first preparing an environmental impact statement under New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991). The relief sought in this proceeding directly affects the relief ordered in *United States and State of New York* v. *County of Westchester*, 89 Civ. 5274 (S.D.N.Y.) (*Westchester II*) an action brought to enforce the Ocean Dumping Ban Act of 1988 (Ban Act), 33 U.S.C. 1414b, 1414c, and to require Westchester to cease all ocean dumping of sewage sludge by December 31, 1991. C.A. App. 25-32. That action was settled by a federal Consent Decree entered in August 1989, as an order of the district court. Westchester Br. in Opp. App. A1-A70; Pet. App. A2-A3. The Consent Decree requires Westchester to phase out ocean dumping of its sewage sludge by December 31, 1991, and to implement both interim and long-term plans for land-based sludge management. *Id.* at A7-A17. Under the court-ordered schedule, Westchester must substantially complete and begin operation of a sludge dewatering facility by December 31, 1991. *Id.* at A10-A11.

1. The Ban Act is the culmination of a series of legislative and regulatory attempts since the 1970s to end ocean dumping of sewage sludge. In the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C.

1401 *et seq.*, Congress sought "to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities." 33 U.S.C. 1401. In 1974 and 1975, the United States Environmental Protection Agency issued permits to ocean dumpers requiring the complete cessation of ocean dumping by December 31, 1981. *United States* v. *County of Nassau*, 733 F. Supp. 563, 565 (E.D.N.Y.), aff'd, 907 F.2d 397 (2d Cir. 1990).

In 1977, EPA amended its regulations to require that each ocean dumper of sewage sludge end ocean disposal by December 31, 1981, unless the dumper obtained a special permit—to be issued at EPA's discretion—authorizing ocean dumping after that date. 40 C.F.R. 220.3(d); 42 Fed. Reg. 2468 (1977). In the same year, Congress amended the MPRSA to require an end to ocean dumping of sewage sludge by December 31, 1981.[2] More than 150 municipalities shifted to land disposal as a result of the 1977 amendments; after 1981, only nine localities continued to dispose of sewage sludge in the ocean. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 25 (1988).[3]

In 1979, the United States filed suit against Westchester to enjoin violations of the amended MPRSA. *United States*

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[2] Pub. L. No. 95-153, § 4(a), 91 Stat. 1255. These amendments defined sewage sludge as "any solid, semisolid, or liquid waste generated by a municipal wastewater treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities." Pub. L. No. 95-153, § 4(b), 91 Stat. 1255; see *City of New York* v. *EPA*, 543 F. Supp. 1084, 1109 (S.D.N.Y. 1981).

[3] The localities that continued the practice were Westchester, New York City, Nassau County and six New Jersey authorities.

v. *Westchester*, 79 Civ. 2186 (S.D.N.Y.) (*Westchester I*). After the district court in a related case concluded that the statute prohibited only ocean dumping that "unreasonably" degraded the marine environment (*City of New York* v. *EPA*, 543 F. Supp. 1084, 1086, 1088 n.3 (1981)), EPA entered into consent decrees with Westchester and the eight other remaining ocean dumpers, permitting continued dumping of sewage sludge into the ocean.[4]

2. On November 18, 1988, Congress enacted the Ban Act. The purpose of that Act is to end for all time the dumping of sewage sludge into ocean waters. See 134 Cong. Rec. 31,510 (1988) (statement of bill's sponsor, Sen. Lautenberg, explaining Conference Report). The Ban Act makes it "unlawful for any person to dump into ocean waters, or to transport for the purposes of dumping into ocean waters, sewage sludge or industrial waste." 33 U.S.C. 1414b(a)(l)(B).[5] The Act provides (a) that no later than August 15, 1989, all nine remaining ocean dumpers shall enter into agreements with EPA as a basis for the receipt of special permits to continue ocean dumping, and (b) that after December 31, 1991, ocean dumping of sewage sludge will be unlawful. 33 U.S.C. 1414b(a)(1).

Ocean dumpers, like Westchester, that are unable to implement a long-term plan to end ocean dumping by December 31, 1991, are required to operate under "enforcement agreements" that provide for payment of fees and penalties as well as mandatory schedules for coming into

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[4] Eventually, all ocean dumping was moved to a site established and monitored by EPA known as the 106-Mile Dump Site. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 25-26 (1988).

[5] By redefining sewage sludge to include any solid, semisolid or liquid waste generated by a wastewater treatment plant (33 U.S.C. 1414b(k)(6)), the new Act "eliminated the loophole used by New York City to continue dumping after the [MPRSA deadline of] 1981." 134 Cong. Rec. 31,510 (1988) (statement of Sen. Lautenberg).

compliance. See 33 U.S.C. 1414b(c)(1), and (3). The Ban Act contemplates that such entities will implement an interim plan to eliminate ocean dumping. 33 U.S.C. 1414b(c)(2)(F) and (c)(3)(F). Congress intended these interim plans to provide an alternative means of meeting the statutory deadline. H.R. Conf. Rep. No. 1090, 100th Cong., 2d Sess. 29 (1988); 134 Cong. Rec. 31,510 (1988) (statement of Sen. Lautenberg).

3. All of the sewage sludge that Westchester dumps into the ocean comes from the Yonkers Joint Wastewater Treatment Plant (YJWTP), which treats approximately 65% of Westchester's sewage. C.A. App. 314-315.[6] Because Westchester planned to continue dumping sewage sludge into the ocean after August 15, 1989, it was required to obtain a permit and to negotiate an agreement with EPA providing for the phasing out of all ocean dumping by December 31, 1991. *Id.* at 315. The agreement was incorporated in the Consent Decree that was entered on August 7, 1989, in *Westchester II*. *Ibid.* EPA issued a special permit to Westchester, effective August 14, 1989, permitting it to continue its current practices while it completed the phase-out of all ocean dumping pursuant to the terms of the Consent Decree. *Id.* at 315-316.

The Consent Decree obligates Westchester to develop and implement a system of interim land-based management for all of Westchester's sludge by December 31, 1991. Section IV of the Consent Decree sets forth a schedule to which Westchester must adhere in order to meet this deadline for its interim management plan. Westchester Br. in Opp. App. A8-A12. [7] Failure to meet one milestone in this schedule

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[6] That facility generates about 1,350 tons of sludge daily, all of which is dumped in the Atlantic Ocean at the 106-Mile Dump Site. App., *infra*, 2a; note 4, *supra*.

[7] These milestones are:

1. *December 31, 1989*—Complete final design of the sludge

can undermine efforts to meet subsequent milestones and the ultimate goal of terminating ocean dumping by December 31, 1991. C.A. App. 321.

The Consent Decree contains detailed provisions for enforcing Westchester's obligations. Section VII of the Consent Decree establishes monetary penalties for noncompliance with the milestone schedules. Westchester Br. in Opp. App. A22-A31. Section X authorizes modification of the Consent Decree only upon the written consent of the parties or by order of the district court. *Id.* at A48. Section XII contains a force majeure provision, which excuses any delay that Westchester can show occurred for reasons beyond its control and despite its compliance with applicable statutes and regulations. *Id.* at A56-A62. Section XV states that the Consent Decree "in no way affects or relieves [Westchester] of responsibility to comply with any other Federal, State, or local law or regulation." *Id.* at A64-A65. Section XVIII provides that the district court retains jurisdiction to enforce the terms and conditions of the Con-

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dewatering equipment.

2. *February 1, 1990*—Advertise for sludge dewatering equipment.

3. *April 1, 1990*—Complete final design of the sludge dewatering facility.

4. *April 15, 1990*—Award contract for sludge dewatering equipment.

5. *May 15, 1990*—Advertise for bids for all contracts necessary to make the sludge dewatering facility operable.

6. *August 15, 1990*—Award all contracts necessary to make the sludge dewatering facility operable.

7. *September 1, 1990*—Issue Notice to Proceed for on-site construction of the sludge dewatering facility.

8. *October 1, 1990*—Commence on-site construction of the sludge dewatering facility.

9. *December 31, 1991*—Substantially complete and place into operation a sludge dewatering facility capable of processing and dewatering all of Westchester's sludge.

sent Decree and to resolve disputes as necessary or appropriate for implementation of the Consent Decree. *Id.* at A66.

4. After extensive analysis, Westchester decided to install its dewatering equipment as an addition to the YJWTP. C.A. App. 322, 397-399.[8] In February 1990, the Westchester County Board of Legislators approved the issuance of a "negative declaration" in connection with the selection of the YJWTP as the site for the new dewatering facility. *Id.* at 294-298, 322. Under New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991) (SEQRA), the negative declaration—*i.e.*, the finding that the project would not have a significant environmental impact—relieved Westchester of any obligation to prepare an environmental impact statement. *Id.* § 8-0109; see App., *infra*, 4a, 6a.

5. On March 20, 1990, petitioners filed this proceeding in state court under Article 78 of the New York Civil Practice Laws and Rules, N.Y. Civ. Prac. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1991). They sought to annul the issuance of the negative declaration, alleging it violated SEQRA and "was substantially and primarily founded on the consideration to prevent casting the County of Westchester in violation of the consent decree signed with the Federal government." C.A. App. 49.

Westchester removed the Article 78 proceeding to the district court pursuant to 28 U.S.C. 1441(b), asserting that the relief sought therein "will have a direct and adverse impact upon the Federal Court Consent Decree" in *West-*

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[8] This analysis included the identification and comparison of 20 possible sites, and the preparation—in accordance with New York State's Environmental Quality Review Act, N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984 & Supp. 1991)—of an Environmental Assessment of the effects of siting the facility at the existing YJWTP. App., *infra*, 3a-4a.

chester II. C.A. App 37.[9] In addition, the United States filed a motion in *Westchester II* under the All Writs Act, requesting that the district court retain jurisdiction over the instant case. C.A. App. 309-311.[10] Petitioners opposed this motion and moved to remand the Article 78 proceeding to state court. *Id.* at 438-440.

The district court refused to remand the case to the state court. It found that both actions should be considered by a single judge; since it already had the Consent Decree before it, it should also determine the Article 78 proceeding. C.A. App. 461-464. Accordingly, on May 24, 1990, the district court signed the All Writs Order, retaining jurisdiction of the Article 78 proceeding and enjoining any further litigation of that action in state court. Westchester Br. in Opp. App. A71-A72.[11]

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[9] The force majeure clause of the Consent Decree requires Westchester to exercise "due diligence and best efforts" to seek removal to the district court of any injunctive actions "directed against work actually being performed in furtherance of sludge treatment and disposal facilities." Westchester Br. in Opp. App. A57. The court-appointed Special Master who monitors Westchester's compliance in *Westchester II* informed the district court that Westchester would "be hard pressed to meet the December 31, 1991 deadline for the cessation of ocean dumping" if the relief sought in this case were granted. C.A. App. 433.

[10] The All Writs Act, 28 U.S.C. 1651, provides in pertinent part:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

[11] The United States and the State of New York were granted intervenor status in the instant case. C.A. App. 22-24. The stipulated terms of intervention on the merits of the proceeding provided that "[i]n the event Westchester County is found to have violated state law, the [United States and New York] may participate as parties on the issue of the scope of relief or remedy, if any, to be ordered." *Id.* at 23.

On July 19, 1990, the district court dismissed the Article 78 proceeding on the merits. App., *infra*, 9a. The district court found that the proceeding was related to the Consent Decree action and that it had jurisdiction over the proceeding under the All Writs Act. *Id.* at 6a. On the merits, the court held that Westchester had complied fully with the state law in deciding to construct the dewatering facility at the YJWTP and that an environmental impact statement was not required. *Id.* at 6a-9a.

6. In the court of appeals, petitioners challenged both the district court's assertion of jurisdiction under the All Writs Act and the district court's dismissal of the Article 78 proceeding on the merits. On February 19, 1991, the judgment of the district court was affirmed in a summary order. Pet. App. A1-A4.[12]

On the issue of jurisdiction, the court of appeals held that a federal court may issue an order under the All Writs Act "to effectuate and prevent the frustration of orders it has previously issued." Pet. App. A3 (relying on *United States* v. *New York Telephone Co.*, 434 U.S. 159, 172 (1977)). The court found that the district court had not abused its discretion in issuing the All Writs Order to prevent interference with the pending Consent Decree, because the record supported the conclusion that the preparation of an environmental impact statement would result in substantial delay and prevent Westchester from complying with the Consent Decree's schedule for phasing out ocean dumping

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[12] Under 2d Cir. R. 0.23, summary orders may be issued in cases "in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion." Summary orders, like oral statements, "do not constitute formal opinions of the court and are unreported and not uniformly available to all parties." They may not, therefore, "be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court."

under the interim plan. Pet. App. A3.[13] The court also affirmed the district court's rulings that installation of a dewatering facility at the YJWTP would have no significant impact on the environment and that, therefore, Westchester's decision not to prepare an environmental impact statement was rational and supported by the record. *Id.* at A3-A4.

ARGUMENT

Petitioners contend (Pet. 5) that in this case "the 'All Writs Act' was misapplied because the outcome of this proceeding posed no threat to the implementation of the Consent Decree and because no Federal concern could be considered in determining the merits" of their state-law claim. The first contention is contrary to the express findings of both courts below, and presents simply a fact-specific question that turns on the precise requirements of the Consent Decree and the evaluation of the extent and effects of delays on those requirements. The second contention is contrary to this Court's consistent interpretation of the scope of the All Writs Act, and petitioners cite no decisions that support their proposed limitation on that scope.[14] In sum, the petition presents no issue warranting review by this Court.

1. This case involves the application of settled principles to a specific factual situation. Although petitioners assert that "the Article 78 proceeding must be seen as being in harmony with the Consent Decree, not as in frustration of it"

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[13] For this reason, the court rejected petitioners' contention that the fact that the Consent Decree does not relieve Westchester of its responsibility to comply with local law means that state court litigation is consistent with the purposes of the Decree. Pet. App. A3.

[14] Moreover, the unpublished summary order of the court of appeals has no value as precedent and may not be cited in unrelated cases. See note 12, *supra*.

(Pet. 5), they do not dispute the finding of both courts below that the record in this case demonstrates that if the relief sought in the Article 78 proceeding were granted and Westchester's "negative declaration" annulled, the resulting delay would jeopardize Westchester's ability to comply with the schedule set forth in the Consent Decree. Pet. App. A3, A14; C.A. App. 323, 328-329, 433. Instead, petitioners contend only that various Consent Decree provisions eliminate the possibility of conflict between the Article 78 litigation and the Consent Decree. The courts below correctly rejected this contention.

Petitioners rely primarily on Section XV of the Consent Decree (Westchester Br. in Opp. App. A64-A65), which provides that the Consent Decree "in no way affects or relieves the defendant of responsibility to comply with any * * * State or local law or regulation." This provision does not, of course, suggest that state court litigation will not interfere with achieving the purpose of the Consent Decree—the cessation of ocean dumping by December 31, 1991, as required by the Ban Act. *Id.* at A2-A3. Cf. *United States* v. *County of Nassau*, 733 F. Supp. at 566, 568 (concluding that essential purpose of similar Consent Decree entered in that case was to comply with Ban Act's requirement). The provision simply requires Westchester to follow state and local law in achieving that goal.[15]

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[15] For similar reasons, petitioners' reliance on the Consent Decree's force majeure clause, Section XII (Westchester Br. in Opp. App. A56-A62), is also unfounded. Petitioners assert that that provision would afford Westchester relief from the Consent Decree schedule if a judicial injunction interfered with Westchester's efforts to implement land-based disposal. But that provision, like Section XV, discussed above, does not obscure the fact that the fundamental purpose of the Consent Decree is the cessation of ocean dumping by December 31, 1991, as required by the Ban Act. *Id.* at A2-A3. In any event, contrary to petitioners' assumption (Pet. 6) that the relief sought by the Article

In any event, and despite petitioners' contrary protestations (Pet. 4 n.3), both courts below concluded that Westchester's selection of the YJWTP as the site for the dewatering facility complied with state law. Petitioners do not ask this Court to review that determination. *Ibid.* Accordingly, petitioners' reliance on Section XV of the Consent Decree to support their Article 78 litigation is unfounded. Moreover, even if Westchester's "negative declaration" had been improper under SEQRA, the district court, unlike the state court, would have confronted the task of fashioning a suitable remedy with a complete understanding of the effect of its actions on the Consent Decree. Cf. *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d 855, 864-865 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).[16] Because

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78 proceeding would qualify as excusable delay under Section XII, invocation of the force majeure clause would require Westchester to show that it "has acted in accordance with applicable statutes and regulations" (Westchester Br. in Opp. App. A57)—a showing that it probably could not make if petitioners were to prevail in the Article 78 proceeding.

Similarly, the fact that the schedule set forth in the Consent Decree may be modified under some circumstances, see Section X (Westchester Br. in Opp. App. A48), does not implicate the purposes of the decree, nor make the schedule any less binding on Westchester. The Consent Decree, while representing an agreement among the parties, is also a court order "backed by the court's power to enforce compliance with it." See *SEC* v. *Levine*, 881 F.2d 1165, 1180 (2d Cir. 1989).

[16] Under New York State law, courts may eschew broad injunctive relief where, as here, strong economic or public interest considerations militate against returning to the status quo ante. See *Golden* v. *Metropolitan Transportation Authority*, 126 App. Div. 2d 128, 132-133, 512 N.Y.S.2d 710, 712-713 (2d Dep't 1987) (citing *Steubing* v. *Brinegar*, 511 F.2d 489, 495 (2d Cir. 1975) (applying same standard in context of federal environmental law) and *Riverdale Environmental Action Comm.* v. *MTA*, 638 F. Supp. 99, 102-103 (S.D.N.Y.), aff'd, 797 F.2d 110 (2d Cir. 1986)); see also *E.F.S. Ventures Corp.* v. *Foster*, 71 N.Y.2d 359, 373, 520 N.E.2d 1345, 1352, 526 N.Y.S.2d 56, 63 (1988).

the district court could best adjudicate and harmonize any conflicts which might have arisen between redressing a violation of SEQRA and enforcing the Consent Decree, it properly exercised its jurisdiction under the All Writs Act to protect the integrity of the Consent Decree. In sum, the possibility of delayed resolution, uncertainty, or inconsistent judicial orders from a state judge divorced from the issues in *Westchester II* is precisely the type of interference with an existing federal court order that the All Writs Act enables federal courts to prevent. Cf. *United States* v. *District of Columbia*, 654 F.2d 802, 809 n.16 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981).

2. Petitioners incorrectly assert (Pet. 6) that "the prerequisite for 'All Writs Act' jurisdiction is a supportable finding that the outcome of the [Article 78] proceeding should be * * * affected by Federal considerations inherent in the Consent Decree." Because SEQRA allegedly does not permit such considerations in evaluating the propriety of the "negative declaration," petitioners contend that the district court lacked jurisdiction under the All Writs Act to consider their Article 78 proceeding. *Id.* at 6-7. Petitioners cite no authority for this novel interpretation of the scope of the All Writs Act, which is inconsistent with the settled principle that "a federal court [may] issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Telephone Co.*, 434 U.S. at 172. Accord *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 273 (1942); *United States* v. *International Brotherhood of Teamsters*, 907 F.2d 277, 280 (2d Cir.), aff'g 728 F. Supp. 1032, 1043-1048 (S.D.N.Y. 1990).

Moreover, judicial power under the All Writs Act may extend to all persons "who, though not * * * engaged in wrongdoing, are in a position to frustrate the implementa-

tion of a court order or the proper administration of justice * * * and encompasses even those who have not taken any affirmative action to hinder justice." *United States* v. *New York Telephone Co.*, 434 U.S. at 174; see *Labette County Commissioners* v. *United States ex rel. Moulton*, 112 U.S. 217, 221 (1884); accord *Yonkers Racing Corp.* v. *City of Yonkers*, 858 F.2d at 863.[17] The basis for All Writs Act

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[17] Recognizing the need for district courts to protect court-ordered relief against interference by third parties, courts of appeals have affirmed district court orders under the All Writs Act in a variety of circumstances. For example, *Yonkers Racing Corp.* v. *City of Yonkers, supra*, involved a federal district court's assertion of jurisdiction over an Article 78 proceeding brought in state court against the City of Yonkers by owners of land that the City sought to condemn in order to meet its obligations under a federal consent decree. 858 F.2d at 858. The Second Circuit upheld the district court's All Writs Act order directing Yonkers to remove the Article 78 proceeding to federal court "because removal was necessary to protect the integrity of the Consent Decree and because the issues raised [in the state court proceedings] cannot be separated from the relief provided by the Consent Decree." *Id.* at 865; accord *In re Baldwin-United Corp.*, 770 F.2d 328, 334-338 (2d Cir. 1985). See *Benjamin* v. *Malcolm*, 803 F.2d 46, 52-54 (2d Cir. 1986) (affirming district court order under All Writs Act joining Governor of New York as third-party defendant in prisoners' rights action and imposing mandatory injunctive relief against him), cert. denied, 480 U.S. 910 (1987); *Safir* v. *United States Lines, Inc.*, 792 F.2d 19, 23-24 (2d Cir. 1986) (affirming district court order under All Writs Act enjoining litigant from "further vexatious litigation"), cert. denied, 479 U.S. 1099 (1987); *United States* v. *International Brotherhood of Teamsters*, 907 F.2d at 280-281 (affirming district court order under All Writs Act enjoining subordinate entities from filing suits relating to pending consent decree except in consent decree court); *United States* v. *Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963) (order under All Writs Act enjoining Governor of Alabama from interfering with court-ordered school desegregation). See also *United States* v. *District of Columbia*, 654 F.2d 802, 809-811 (D.C. Cir.) (upholding injunction against state court proceedings to protect Clean Water Act consent decree and court orders requiring selection and development of sludge disposal sites),

jurisdiction is thus the protection of the power of the federal court, not the legality *vel non* of the action to be enjoined. *A fortiori*, that jurisdiction is not affected by the scope of the questions involved in a proceeding to be enjoined.

3. Petitioners' final argument (Pet. 7) is that the All Writs Act was unconstitutionally applied in this case.[18] This argument rests on their hypothesis that their Article 78 proceeding posed no threat to achievement of the purposes of the Consent Decree, and, accordingly, that "there was no justification for usurping the State court's jurisdiction." The argument falls with the hypothesis. As we have explained, petitioners' contention that the Article 78 proceeding was consistent with the purposes of the Consent Decree was correctly rejected by both courts below. For that reason, their claim that there was no federal interest to justify the All Writs Order is plainly without merit. Because of the pending Consent Decree and the potential for inconsistent or conflicting orders, the district court had a substantial interest in the prompt and correct resolution of petitioners' state law claims. In short, the court of appeals correctly found that the district court did not abuse its discretion in using the All Writs Act to take jurisdiction of the related state proceeding.

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cert. denied, 454 U.S. 1082 (1981); *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (upholding injunction against state court proceeding to aid desegregation court order); *Mumford Cove Ass'n* v. *Town of Groton*, 647 F. Supp. 671, 688, 691 (D. Conn. 1986) (granting injunction against local administrative agency to prevent frustration of Clean Water Act consent decree); *Grenchik* v. *Mandel*, 373 F. Supp. 1298, 1300-1302 (D. Md. 1973) (granting injunction against state court proceeding to aid desegregation decree).

[18] They made no such claim in the district court or in the court of appeals. Petitioners may not now seek this Court's review of an issue they did not raise below. *Rogers* v. *Lodge*, 458 U.S. 613, 628 n.10 (1982); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

APPENDIX

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 90 Civ. 2543 (WK)

IN THE MATTER OF THE APPLICATION OF THE LUDLOW PARK HOMEOWNERS ASSOCIATION, HENRY SPALLONE AS MAYOR OF THE CITY OF YONKERS, AND G. OLIVER KOPPELL, AS ASSEMBLYMAN FOR THE 80TH ASSEMBLY DISTRICT, PETITIONER

v.

THE COUNTY OF WESTCHESTER AND THE WESTCHESTER COUNTY BOARD OF LEGISLATORS, RESPONDENTS

for an order pursuant to CPLR Article 78 reversing and annulling the determination of the respondents to the effect that an environmental impact statement regarding the construction of a sludge dewatering facility at the Yonkers sewage treatment plant is not to be required.

July 19, 1990.

MEMORANDUM AND ORDER

WHITMAN KNAPP, District Judge.

Petitioners the Ludlow Park Homeowners Association, Henry Spallone and G. Oliver Koppell seek a judgment pursuant to C.P.L.R. Article 78 and the State Environmental

Quality Review Act ("SEQRA") reversing a determination by respondents the County of Westchester and the Westchester County Board of Legislators. For reasons which follow, we deny the petition.

BACKGROUND

The Ocean Dumping Ban Act of 1988 forbids ocean dumping of sewage sludge after December 31, 1991. In 1989, the United States and the State of New York brought suit against the County of Westchester and the Westchester County Department of Environmental Facilities, seeking to ensure that the County would comply with that statute. The action was resolved by a consent decree[1] establishing a timetable for the County's development of alternative means for disposing of its waste in accordance with the law.

The Yonkers Joint Wastewater Treatment Plant (hereinafter "YJWTP"), which the County has operated since 1955, each day produces approximately 1,350 tons of liquid sewage sludge, which is dumped into the ocean. Such dumping will, under the terms of the statute, become unlawful unless discontinued on or before December 31, 1991. Under the consent decree, the County must, by that date, construct a "dewatering" facility[2] capable of transforming the liquid sewage sludge into "sludge cake," which can be disposed of on land.

In June 1989, the County hired Blasland & Bouck Engineers, P.C., an engineering consulting firm, to evaluate various methods for transporting the liquid sewage sludge from the YJWTP to such a dewatering facility and to

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[1] *United States v. County of Westchester*, No. 89 Civ. 5274 (WK), September 6, 1989.

[2] A "dewatering" facility uses centrifuges to extract water from liquid sewage sludge. The resulting "dewatered" sludge is known as "sludge cake." The contaminated water extracted is known as "centrate."

identify possible sites for that facility. After assessing the relative environmental risks, cost-effectiveness and feasibility of several means of transporting liquid sewage sludge, the engineers concluded that the sludge might be transported by pipeline or by barge, but that the farther the liquid sewage sludge was transported the greater the risk of an accidental spill. With this in mind, the engineers identified twenty possible sites and ranked them according to the following criteria: (1) distance the liquid sewage sludge would have to be transported, (2) distance to the nearest park, recreational area, cultural or archeological resource, (3) distance to the nearest incompatible land use (*i.e.*, school, hospital, day-care facility), (4) impact on local traffic, (5) distance to the nearest residential area, (6) impact on ambient area quality, (7) impact on ambient air quality, (8) visual impact, (9) method by which the liquid sewage sludge would have to be transported, (10) site preparation required, (11) site topography and (12) whether the site was publicly or privately owned. Based on those criteria, they narrowed their investigation to what they determined were the eleven best sites.

The engineers then conducted a detailed comparative analysis of how the facility would be constructed and operated at each of those sites. Since the centrate generated at the dewatering facility would have to be further processed at the YJWTP, this stage of the engineers' analysis took into account, in addition to the above-listed criteria, how the centrate would be transported back to YJWTP. The report concluded that the best option would be to construct a 30′ × 50′ addition to the YJWTP. Among the advantages of building the facility as an addition to the YJWTP, rather than at a different site, were the elimination of environmental risks that would have accompanied transporting liquid sewage sludge from the centrate back

to the YJWTP and the low relative cost of constructing and operating the facility there.

Pursuant to 6 NYCRR § 617.5(b), the engineers went on to complete a Full Environmental Assessment of the environmental effects of locating the dewatering facility at YJWTP. The YJWTP is situated alongside MetroNorth railroad tracks. Across the tracks lies a residential area known as Ludlow Park. As the Environmental Assessment noted, that area has been designated a "critical environmental area, Type I" pursuant to 6 NYCRR § 617.11. After examining any effects the proposed facility would have on land, water, air, plant and animal life, agricultural, aesthetic, historical and archeological resources, recreational areas, transportation, energy, noise, odor, public health and the growth and character of the surrounding neighborhood, the engineers concluded that it would "not have a significant impact on the environment" and recommended that the County issue, pursuant to E.C.L. § 8-0109, a negative declaration stating that no environmental impact statement was called for.

On January 17, 1990, the engineers' study, the Full Environmental Assessment, and supporting documentation were submitted to the Westchester County Board of Legislators. On January 29, the Board's Committee on Budget and Appropriations conducted an open hearing, at which one of the consulting engineers discussed the study and answered the Committee's questions. The next day, the full Board held another open hearing. Present were thirteen of the seventeen members of the Board and approximately 100 residents and representatives of the media. At that hearing, the consulting engineer described the procedures used and recommendations made in the study. The Board also heard comments from some of the residents.[3]

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[3] On the basis of a resident's observations at the meeting, petitioners assert that several of the Board members declared that they had not

On February 1, the Committee recommended to the Board that it find that the proposed facility would not have a significant effect on the environment and issue a negative declaration. The Committee report stated that its recommendation was based on, *inter alia*, information gathered in the engineers' study, the Full Environmental Assessment,

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reviewed the engineers' report or the Full Environmental Assessment. Even if such an assertion were relevant to our review, we would conclude, based on the following exchange at oral argument, that the particular assertion here put forward is too flimsy to credit.

> MR. ZURHELLEN [For petitioners]: . . . [T]here was a meeting in our neighborhood among I think all the members or most of the members of the committee and this person, Mr. Feinstein, asked them whether they had even read the two books worth of documents that were submitted by county, and only two of the fourteen or fifteen people there said they had. The others did not.
>
> THE COURT: Did the others say they hadn't or just made no answer?
>
> (Pause)
>
> THE COURT: Off the record.
>
> (Discussion off the record) [with Mr. Feinstein]
>
> THE COURT: We will put on the record that the gentleman in the audience said he was there at the meeting and most of them just kind of shook their heads, I couldn't make out whether they were annoyed at the question or answering the question, at least from his view.
>
> MR. ZURHELLEN: I am advised by my client not only here but beforehand that there was an indication by the other members that they had not read the thing, whether it was a no or a shaking of the head, but Mr. Feinstein confirmed to me, the person who did the affidavit, that there was an indication of a negative.
>
> THE COURT: Beauty is in the eye of the beholder and if you are going to a meeting expecting to be annoyed at what you see, you will get annoyed by what you see.
>
> MR. ZURHELLEN: Could be.

Transcript of Oral Argument, May 30, 1990 at 15-16.

the hearings and a review of the criteria listed in NYCRR § 617.11.

On February 5, the Board issued a resolution reciting that "the County must now proceed with the preparations for implementing a dewatering facility, while it simultaneously investigates substitute methods, in order to meet the milestone deadlines set forth in the consent decree and avoid monetary penalties that could be imposed for failure to meet those deadlines" and determining that, based on its review of the engineers' study, the Environmental Assessment and "all other relevant supporting documentation," a negative declaration should be issued.

On March 22, 1990, a group of Ludlow Park residents opposed to further development of the YJWTP site, the mayor of the City of Yonkers and the state assemblyman for the Ludlow Park area commenced this Article 78 proceeding in the Supreme Court of New York, County of Westchester, seeking to reverse the Board's determination. Respondents removed to this court, where the action was deemed related to the one in which the consent decree had been filed. On May 10, 1990, we determined to exercise jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651.

DISCUSSION

Under SEQRA, respondents were required to determine whether constructing a dewatering facility at YJWTP would have a "significant effect" on the environment and, if they so determined, to cause an environmental impact statement to be prepared. 6 NYCRR 617.1(c). In this Article 78 proceeding, we review respondents' determination that no such statement was required to decide whether or not it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion. . . ." C.P.L.R. § 7803(3), *Pell v. Board of Edu-*

cation (1974) 34 N.Y.2d 222, 230-32, 356 N.Y.S.2d 833, 839-40, 313 N.E.2d 321; *Colton v. Berman* (1967) 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 651, 234 N.E.2d 679. We are required to conclude that the determination was proper if, in making it, respondents identified all areas of concern, took a "hard look" at the issues involved, and made a "reasoned elaboration" for the basis of their finding that the facility would have no signficant environmental effects. *Jackson v. New York State Urban Development Corp.* (1986) 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305, 494 N.E.2d 429. Our role is not "to weigh the desirability of any action or choose among alternatives, but to assure that [respondents have] satisfied SEQRA, procedurally and substantively." *Id.*

Petitioners make four principal arguments against the respondents' determination. They contend that the Board (1) improperly based its findings on the study and the Full Environmental Assessment rather than on reasons expressly enumerated in its resolution; (2) impermissibly took into account the deadlines established in the consent decree; (3) failed adequately to consider the effect of any additional traffic required to remove the sludge cake from the facility; and (4) did not give due deference to the fact that the Ludlow Park area has been deemed "Type I." We find these arguments to be without merit.

We follow *Stewart Park and Reserve Coalition v. New York State Department of Transportation* (3d Dept.1990), 157 A.D.2d 1, 555 N.Y.S.2d 481, 484 in concluding that the Board's basing its resolution on the recommendations in the report and Environmental Assessment was entirely proper under *Jackson, supra,* in the absence of any indication that reliance on the engineering consultants was unreasonable.

We also see nothing improper in the resolution's recitation of the fact that the County, under the terms of the

consent decree, was bound to meet certain deadlines. The Board, of course, could hardly have made its decision to construct a dewatering facility without reference to that fact. The circumstance that, as petitioners insinuate, the deadlines in the consent decree might conceivably have provided respondents with a motive for not complying with the applicable legal standards is simply a red herring; the issue to be determined is whether or not they complied, not why they might not have complied.

Nor can we say that respondents failed to identify and take a hard look at the traffic issue. To the contrary, the Full Environment Assessment supported its conclusion that transporting the sludge cake from the facility would not result in the generation of traffic significantly above current levels with the following discussion:

> The only traffic generated by the operation of the proposed facility will result from the transportation of the dewatered sludge to its disposal location and employees going to work and leaving work. Approximately six trucks per day will be required for the transportation of dewatered sludge from the YJWTP to the disposal facility. Potential impacts to local traffic are expected to be insignificant based on the amount of traffic generated as a result of two new employees and five additional truck [sic] entering and leaving the YJWTP per day (Part 3, p. 11).

Petitioners insist that, by their calculations, a total of ten or twelve trucks—rather than five—will be required. Even if petitioners should turn out to have been correct in this prediction, it would not follow that the Board had arrived at its contrary determination, based on the engineers' study and the Full Environmental Assessment, arbitrarily, capriciously or in an abuse of discretion.

Finally, we note that the Ludlow Park area's designation as Type I, which was specifically noted in the Full Environmental Assessment and the negative declaration, did not command a determination that an environmental impact statement was required; it merely made such a determination "more likely." 6 NYCRR § 617.11; *Jaffe v. RCI Corp.* (3d Dept. 1986) 119 A.D.2d 854, 500 N.Y.S.2d 427, 429. Where, as here, the County followed the appropriate procedural requirements for a Type I area, "the issue distills to whether its conclusion that the proposed project would have no significant impact on the environment is a rational one which is supported by the record." *Id., citing Matter of Inland Vale Farm Co. v. Stergianopoulos* (1985) 65 N.Y.2d 718, 492 N.Y.S.2d 7, 481 N.E.2d 547. Based on our examination of the record, we find that it is.

CONCLUSION

We deny the petition.

SO ORDERED.

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